(28,377)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 422.

GEORGE B. KIRBY, CHARLES McDANIELS, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE CROW TRIBE OF INDIANS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Names and Addresses of Attorneys of Record.

GEO. F. SHELTON, Esq., United States Attorney, Helena, Montana,

Attorney for Plaintiff and Defendant in Error.

Messrs. GUNN, RASCH & HALL, Helena, Montana,

Messrs. GRIMSTAD & BROWN, Billings, Montana,

Attorneys for Defendants and Plaintiffs in Error Kirby and U. S. F. & G. Co.

HUGH THOMAS CARTER, Esq., Helena, Montana,

Attorney for Defendant and Plaintiff in Error McDaniels. [1*]

Thereafter, on January 12, 1920, an amended complaint was filed herein in the words and figures as follows, to wit: [62]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,

Defendants.

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*Page-number appearing at foot of page of original certified Transcript of Record.

Amended Complaint.

Comes now the above-named plaintiff and pursuant to stipulation of the parties on file herein, and with the consent of the Court first had and obtained, files this its amended complaint, and for cause of action alleges:

1. That at all the times hereinafter mentioned the United States Fidelity and Guaranty Company was and it now is a corporation created, organized and existing under and by virtue of the laws of the State of Maryland.

2. That George B. Kirby, Charles McDaniels and the United States Fidelity and Guaranty Company, a corporation, are residents of the State and District of Montana.

3. That on the 17th day of September, 1918, in accordance with the provisions of section three (3) of the Act of Congress approved February 28, 1891 (26 Stat. L. 794), as amended by the Act of August 15, 1894 (28 Stat. L. 305), and in pursuance of a resolution of the Crow tribal council, dated July 29, 1915, a grazing lease was entered into by and between Evan W. Estep, as superintendent of the Crow Indian School for and on behalf of the Crow Tribe of Indians, and George B. Kirby and Charles McDaniels, covering what was then known as District No. 5, now included in the Indian Range on the Crow Indian Reservation, Montana, for the purpose of grazing cattle, which lease was approved by the Secretary of the Interior, January 11, 1916, a full, true and correct copy [63] of which lease is

hereto attached, marked Exhibit "A," and by reference made a part hereof.

4. That to secure the performance of the covenants and agreements contained in said lease and to be kept and performed by said George B. Kirby and Charles McDaniels, the said George B. Kirby and Charles McDaniels as principals and the United States Fidelity and Guaranty Company, a corporation, as surety, executed and delivered their certain agreement in writing, a full, true and correct copy of which is hereto attached, marked Exhibit "B," and by reference made a part hereof.

5. That under the terms and provisions of said lease said George B. Kirby and Charles McDaniels kept the following number of cattle on the lands described in said lease each month during the life of said lease:

1916, 1917		1917, 1918	
February	0	February	18,364
March	719	March	18,364
April	3,697	April	19,270
May	5,779	May	19,270
June	6,873	June	20,903
July	8,270	July	21,433
August	8,604	August	21,433
September	7,311	September	20,644
October	14,526	October	18,283
November	16,961	November	15,770
December	16,981	December	13,085
January	18,364	January	10,928

6. That the sum of thirty-one thousand nine hundred and fifty dollars ($31,950) and no more has

been paid on account of the cattle so grazed on said lands for the first year of said lease, and the sum of thirty-one thousand nine hundred fifty dollars ($31,950) and no more has been paid on account of the cattle so grazed on said lands during the second year of said lease.

7. That the sum of one hundred forty-one thousand and [64] forty-nine dollars ($141,049.00) is now due, owing and unpaid from the defendants George B. Kirby and Charles McDaniels for and on account of the cattle so grazed on said lands as hereinbefore mentioned and set forth; that of said total sum there are due, owing and unpaid the following sums for the following years, to wit:

For the year 1916 the sum of thirty-five thousand nine hundred twenty-four and 50/100 dollars ($35,924.50); for the year 1917 the sum of ninety-six thousand four hundred forty-eight and 50/100 dollars ($96,448.50); and for the year 1918 the sum of eight thousand six hundred and seventy-six dollars ($8,676.00).

WHEREFORE plaintiff prays judgment against the defendants George B. Kirby and Charles McDaniels for the sum of one hundred forty-one thousand and forty-nine dollars ($141,049.00), with interest at the rate of eight per cent per annum on the following sums from the following dates: On thirty-five thousand nine hundred twenty-four and 50/100 dollars ($35,924.50), from January 1, 1917; on ninety-six thousand four hundred forty-eight and 50/100 dollars ($96,448.50) from January 1, 1918; and on eight thousand six hundred seventy-six dol-

lars ($8,676.00) from February 1, 1918; against the defendant United States Fidelity and Guaranty Company, a corporation, for thirty-one thousand nine hundred and fifty dollars ($31,950.00), with interest thereon at the rate of eight (8) per cent per annum from January 1, 1917; and against all of the defendants for its costs and disbursements herein necessarily expended.

E. C. DAY,
United States Attorney,
District of Montana.
W. W. PATTERSON,
Assistant U. S. Attorney,
District of Montana. [65]

United States of America,
District of Montana,—ss.

Edward C. Day, being first duly sworn, deposes and says that he is the duly appointed, qualified and acting United States Attorney for the District of Montana; that he has read the foregoing amended complaint and knows the contents thereof, and that the matters and things therein contained are true to the best of his knowledge, information and belief.

EDWARD C. DAY.

Subscribed and sworn to before me this 24th day of December, 1919.

[Seal] W. W. PATTERSON,
Notary Public in and for the State of Montana,
Residing at Helena, Montana.
My commission expires May 6, 1920. [66]

Exhibit "A."

(Write all names in full.)

GRAZING LEASE OF TRIBAL LANDS.

This indenture of lease, in quadruplicate, made and entered into by and between Evan W. Estep, Superintendent of the Crow Indian School, party of the first part, for and on behalf of the Crow Tribe of Indians, occupying and residing upon the Crow Reservation, under and pursuant to the action of the council of the tribe, speaking for the tribe, duly authorizing the leasing of the portion of the reservation hereinafter described, which is not now needed for farming or agricultural purposes and is not now desired for individual allotments, for the period of two years from the first day of February, 1916, to the thirty-first day of January, 1918, as per resolution of the Crow Tribal council, dated July 29, 1915, and in accordance with the provisions of Section 3 of the act of Congress approved February 28, 1891 (26 Stat. 794), as amended by the act of Congress of August 15, 1894 (28 Stat. 305), and George B. Kirby and Charles McDaniels, parties of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the payments to be made by the said parties of the second part, as herein agreed and stipulated, and the execution of a legal bond in the sum of thirty-one thousand, nine hundred and fifty dollars ($31,950.00), conditioned upon the faithful performance hereof, and by authority of the said council proceedings and the said

acts of Congress, above mentioned, and subject also to the approval of the Secretary of the Interior, does, by these presents, lease and grant unto the said parties of the second part for the period of two years from the first day of February, 1916, to the thirty-first day of January, 1918, for the purpose of grazing cattle, the following described portion of said reservation namely: [67]

District No. 5.

The south boundary of this district is the south line of the reservation (which is also the line between the States of Montana and Wyoming) from the point where it crosses the line of the Chicago, Burlington & Quincy Railway to the west line of the reservation at the Big Horn River; the west line follows the Big Horn River to the Black Canon, thence up the Black Canon to a point near the southwest corner of Township 6 south, and range 31 east; the north line begins at a point on the Black Canon near the southwest corner of township 6 south, of range 31 east and runs thence east along township lines to the northeast corner of section four, township 7 south, range 34 east, thence due south along section lines to the southeast corner of the northeast quarter of section 21, township 7 south, range 34 east, thence due east to the township line between ranges 34 and 35 east, thence south along section lines of the southwest corner of township 7 south, range 35 east, thence due east to the line of the Chicago, Burlington & Quincy Railroad, a distance of four or five miles; the east boundary is the line of the said railroad to the point

where it crosses into the State of Wyoming. Area of tribal lands estimated at 363,531 and allotted lands at 85,130 acres, of which fully 10,000 acres is fenced and in private use.

And the said parties of the second part, for and in consideration of the privilege of holding and grazing cattle upon the lands hereinbefore described, for the period of time [68] herein stated, hereby covenant and agree to pay the Superintendent of said Indian School at Crow Agency, Montana, the sum of thirty-one thousand nine hundred and fifty dollars ($31,950.00) per annum, said sum to be paid in lawful money of the United States in equal semi-annual payments, to wit, on the first day of February, 1916, and on the first day of August, 1916, and on the same dates for each year during the term of this lease.

PROVIDED, ALWAYS, And it is further covenanted and agreed between the said parties hereto that if any payment, or any part thereof, shall remain unpaid after the expiration of thirty days after the same shall have become due, as hereinbefore stipulated, or if the said parties of the second part shall use, or cause to be used, any of the above-described lands for other than grazing purposes, as herein specified, or shall cut timber therefrom, or otherwise commit waste thereon, then and from thenceforth it may be lawful, and it is agreed that the COMMISSIONER OF INDIAN AFFAIRS may declare this lease to be forfeited and annulled and from and after such declaration the same shall be null and void and of no effect, and it shall be

the duty of the said COMMISSIONER OF INDIAN AFFAIRS to cause the said parties of the second part to be removed from said reservation lands above described, with all stock and other appurtenances belonging to said parties of the second part which may be thereon, without liability to the United States or of any officer of the United States for any loss or damage that may be caused by such removal. It is also expressly agreed between [69] the parties hereto that neither the lands covered by this lease, nor any part thereof, shall be subleased or sublet in any manner whatever without the written consent of the council speaking for the tribe and the approval thereof by the Secretary of the Interior, and that any violation of this provision shall *ipso facto* work as forfeiture of the lease.

AND IT IS FURTHER AGREED that the number of cattle to be grazed on the territory described above shall be limited to an average of nine thousand (9,000) head, the maximum number at any one time not to exceed eleven thousand, five hundred (11,500) head, and that any excess over and above such maximum number shall be paid for at the rate of $4.50 per head for each and every head of such excess number, in addition to the rental herein named. It is also expressly agreed that the parties of the second part shall themselves, or by competent foreman, execute and deliver to the Superintendent of the Crow Indian School an affidavit executed about the close of June of each year and another about the close of December of each year, setting forth the number of livestock being grazed under

this lease and the changes in such number for the six months previous to the execution thereof.

AND IT IS FURTHER AGREED between the parties hereto that the privilege of holding stock upon the lands herein described for the period of time herein specified is permitted and agreed to upon the following conditions named in the proposal calling for bids: [70]

In addition to the tribal land included in this lease, the parties of the second part will be allowed to use all the unfenced allotted land in the district on entering into leases at the stated rate of 10 cents per acre per annum with the Indians for all the unfenced allotted land they are willing for them to have. If any of the Indians are unwilling to lease their allotments, they will have the right to withdraw them from the open range by enclosing them with a lawful fence, according to the laws of the State of Montana, and when so fenced to use them themselves or lease them for either farming or grazing purposes.

The parties of the second part will be required to pay the entire consideration for the rental of the district semi-annually in advance, and the Superintendent of the Crow Indian School will deduct from the amount paid for the entire district, a sufficient amount to pay the individual allottees for the use of their unfenced allotments.

The parties of the second part may be required to purchase, 30 days after stacking, all surplus hay offered for sale by Indians within this district, provided the hay is properly fenced to protect it from

stock. The hay will be measured by representatives of the government and the parties of the second part will be required to pay the current market price, and the minimum price to be paid is hereby fixed at $5 per ton. The parties of the second part will be required to round up and to ship without range charges all Indian stock of like kind of their own offered for market, within their district, but said shipments are to be made only when the parties of the second part are shipping their own stock.

Each Indian family residing within a district will be allowed grazing on the open range for all the stock such family actually owns. [71]

The parties of the second part will not be allowed to assign their privileges to another or to sublease without the consent of this Department first being obtained, but this is not intended to prevent them from taking stock to pasture of like kind to their own when they do not have a sufficient number of their own to fill in the minimum number allowed their district and where they handle such stock with their men and outfit, provided due notice is given the reservation authorities of the numbers thus taken with the name of the owners. The parties of the second part must not employ any person whose presence on the reservation is deemed by the superintendent thereof to be detrimental to the interest of the Indians.

Where there are fences on the district the parties of the second part will be required to put them in good order and keep them so during the term of

the lease. The parties of the second part will be allowed to place upon tribal land buildings, corrals and fences necessary for properly conducting their stock business and to remove the same prior to the expiration of the lease. If left on the land at the expiration of the lease, they will become the property of the Indians. If the parties of the second part wish to use allotted land for this purpose it will be necessary to enter into a lease therefor with the individual Indian, subject to the approval of the superintendent, and to pay the Indian a proper rental therefor.

AND IT IS FURTHER AGREED that the party of the first part shall have the right to have a representative at each roundup [72] to check the number of stock on the district under this lease, and in case the parties of the second part shall fail or refuse to round up their stock at proper times and in a satisfactory manner for the purpose of allowing the party of the first part to count the number, the party of the first part shall have the right to round up and count said stock at the expense of the parties of the second part.

It is also expressly agreed that all fenced allotments of land in severalty and all fenced farms, gardens, and other improved holdings of individual Indians shall at all times be kept free from damage or interference by the stock or employees of the said parties of the second part; and it is agreed and understood that any violations of these provisions shall render this lease void, and shall subject

the leassees and their stock to immediate removal from the reservation.

AND IT IS FURTHER PROVIDED AND AGREED by and between the parties hereto that the right to bring, hold or graze cattle under this lease, on the above-described lands, shall at all times be subject to any quarantine restrictions, regulations, and conditions established or that may be established by the Department of Agriculture, and made applicable to the district or country in which the lands to be leased lie.

And it is further agreed that if any of the tribal land herein described shall be allotted to individual Indians during the terms of this lease, the parties of the second part shall be permitted to continue to use such land under the conditions heretofore named for the use of unfenced allotted land.

And it is further provided and agreed that if at the expiration of this lease, the district is not needed for Indian stock, the parties of the second part shall have the privilege [73] of renewing it for one or two years under the same terms and conditions.

And the said parties of the second part further agree that at the expiration of this lease they will surrender the possession of the above-described lands to said tribe of Indians in as good condition as when received, ordinary wear and tear for the uses herein mentioned alone excepted.

AND IT IS FURTHER PROVIDED AND AGREED between the parties that no Member of or Delegate to Congress shall be admitted to any share or part in this grazing lease, or derive any

benefit to arise therefrom; AND ALSO THAT THIS INDENTURE SHALL BE SUBJECT TO THE APPROVAL OF THE SECRETARY OF THE INTERIOR.

Signed and sealed this 17th day of December, 1915.

EVAN W. ESTEP, (Seal)
Superintendent.

Witnesses:
C. D. MUNRO.
S. J. SHICK.

GEORGE B. KIRBY. (Seal)
CHARLES McDANIELS. (Seal)

JAMES B. VREDENBURGH.
WILLIAM P. MATHESON. [74]

Exhibit "B."

"The rate of Premium on this bond is $10.00 per thousand, and the total amount of premium charged is $319.50.

One Dollar Sixty Cents ($1.60) Revenue Stamps. Cancelled.

BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, GEORGE B. KIRBY and CHARLES McDANIELS, principals, of Billings, county of Yellowstone, and State of Montana, and UNITED STATES FIDELITY AND GUARANTY CO., of BALTIMORE, a corporation, created and existing under the laws of the State of Maryland, surety of ———, county of ———, and State of ———, and ———, surety of ———,

county of ——— and state of ———, are held and firmly bound unto the United States of America, in the sum of Thirty-one Thousand Nine Hundred Fifty ($31,950) Dollars, lawful money of the United States to be paid to the Secretary of the Interior for the use and benefit of the Crow Indians, for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and assigns, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals, attested by our signatures, at Helena, Montana, this 21st day of December, in the year of our Lord one thousand nine hundred and fifteen.

THE NATURE OF THIS OBLIGATION IS SUCH, That if the said George B. Kirby and Charles McDaniels, their heirs, executors, administrators, and assigns, or any of them, shall, and do in all things well and truly observe, perform, fulfill, accomplish, and keep all and singular the covenants, conditions, and agreements whatsoever, which on the part of the said George B. Kirby and Charles McDaniels, their heirs, executors, administrators, [75] and assigns, are, or ought to be, observed, performed, fulfilled, accomplished, and kept, comprised, or mentioned in a lease bearing date the 17th day of December one thousand nine hundred and fifteen between the said Evan W. Estep, Superintendent, and the said George B. Kirby and Charles McDaniels, concerning the leasing of certain lands on the Crow Indian Reserva-

tion according to the true intent and meaning of said lease, then the above obligation to be void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in the presence of—

GEORGE B. KIRBY. (Seal)

CHARLES McDANIELS. (Seal)

JAMES B. VREDENBURGH.

WILLIAM P. MATHESON.

UNITED STATES FIDELITY AND GUARANTY COMPANY. (Seal)

CLINTON O. PRICE,
Its Attorney in Fact.

FORD E. ALBRECHT.

ANNIE KENNEDY.

(Write all names in full.)

Filed January 12, 1920. C. R. Garlow, Clerk. By H. H. Walker, Deputy Clerk. [76]

Thereafter, on January 24, 1920, answer of defendant Kirby to amended complaint was duly filed herein, in the words and figures following, to wit: [77]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, for and on Behalf of the CROW TRIBE OF INDIANS,
Plaintiff,

vs.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Defendants.

Answer of George B. Kirby to Amended Complaint.

Comes now the defendant, George B. Kirby, and for answer to the amended complaint of the plaintiff on file herein:

I.

Admits the allegations of paragraphs 1, 2, 3, 4 and 6 of said amended complaint.

II.

Denies each and every allegation in said amended complaint not herein specifically admitted or denied.

WHEREFORE, defendant, having fully answered, prays to be hence dismissed, with his just costs.

GRIMSTAD & BROWN,
GODDARD & CLARK,
GUNN, RASCH & HALL,
Attorneys for Defendant, George B. Kirby.

[78]

State of Montana,
County of Lewis and Clark,—ss.

M. S. Gunn, being duly sworn, deposes and says: That he is one of the attorneys for the defendant, George B. Kirby; that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true, to the best of his knowledge, information and belief; that the reason he makes this verification is because the defendant is not now within the County of Lewis and Clark, State of Montana, wherein affiant resides.

M. S. GUNN.

Subscribed and sworn to before me this 23d day of January, 1920.

[Seal] E. M. HALL,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires August 5, 1922.

Copy of within received Jan. 24, 1920.

E. C. DAY,
U. S. District Atty.

Filed Jan. 24, 1920. C. R. Garlow, Clerk. By H. H. Walker, Deputy Clerk. [79]

Thereafter, on January 24, 1920, answer of defendant U. S. F. & G. Co. to amended complaint was duly filed herein, in the words and figures following, to wit: [80]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, for and on Behalf of the CROW TRIBE OF INDIANS,
Plaintiff,

vs.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Defendants.

Answer of United States Fidelity and Guaranty Company to Amended Complaint.

Now comes the defendant, United States Fidelity and Guaranty Company, a corporation, and for answer to the amended complaint herein:

I.

Admits the allegations contained in paragraphs 1, 2, 3, 4 and 6 of said amended complaint, except that this defendant denies that it is or was ever a resident of the State of Montana.

II.

As to paragraphs 5 and 7 of said amended complaint, this answering defendant denies any knowledge or information thereof sufficient to form a belief.

III.

Denies generally each and every allegation of said amended complaint not hereinbefore specifically admitted or denied.

WHEREFORE, defendant, having fully answered, prays to be hence dismissed, with its just costs.

GRIMSTAD & BROWN,
GODDARD & CLARK,
GUNN, RASCH & HALL,
Attorneys for Defendant, United States Fidelity & Guaranty Co. [81]

State of Montana,
County of Lewis and Clark,—ss.

M. S. Gunn, being duly sworn, deposes and says: That he is one of the attorneys for the defendant, United States Fidelity and Guaranty Company; that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true, to the best of his knowledge, information and belief; that the reason he makes this verification is because there is no officer of the defendant now in the county of Lewis and Clark, State of Montana, where affiant resides.

M. S. GUNN.

Subscribed and sworn to before me this 23d day of January, 1920.

[Seal] E. M. HALL,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires August 5, 1922.
Copy of within received Jan. 24/20.

E. C. DAY,
U. S. Dist. Atty.
W. W. P.

Filed Jan. 24, 1920. C. R. Garlow, Clerk. [82]

Thereafter, on January 27, 1920, answer of defendant McDaniels to amended complaint was duly filed herein, in the words and figures following, to wit: [83]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, for and on Behalf of the CROW TRIBE OF INDIANS,
Plaintiff,

vs.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Defendants.

Answer of Charles McDaniels to Amended Complaint.

Comes now the defendant, Charles McDaniels, and for answer to the amended complaint of the plaintiff on file herein:

I.

Admits the allegations of paragraphs 1, 2, 3, 4 and 6 of said amended complaint.

II.

Denies each and every allegation in said amended complaint not herein specifically admitted or denied.

WHEREFORE, defendant, having fully answered, prays to be hence dismissed, with his just costs.

HUGH THOS. CARTER,
Attorney for Defendant, Charles McDaniels.
[84]

State of Montana,
County of Lewis and Clark,—ss.

Charles McDaniels, being first duly sworn, deposes and says: That he is a party defendant herein; that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true, to the best of his knowledge, information and belief.

CHARLES McDANIELS.

Subscribed and sworn to before me this 27th day of January, 1920.

[Seal] HUGH THOS. CARTER,
Notary Public for the State of Montana, Residing at Helena, Montana.
My commission expires September 17, 1922.

Filed January 27, 1920. C. R. Garlow, Clerk. By H. H. Walker, Deputy Clerk. [85]

Thereafter, on Feb. 4, 1920, stipulation waiving jury trial was duly filed herein, in the words and figures following, to wit: [86]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Defendants.

Stipulation Waiving Jury Trial.

The parties to the above-entitled action, by their respective attorneys, hereby expressly stipulate to waive a jury in said cause, and consent to the trial of same before the court without a jury.

Dated this 4th day of February, 1920.

EDWARD C. DAY,
W. W. PATTERSON,
Attorneys for Plaintiff.
GRIMSTAD & BROWN,
GODDARD & CLARK,
GUNN, RASCH & HALL,
Attorneys for Defendants Kirby and United States Fidelity & Guaranty Company.
HUGH THOS. CARTER,
Attorney for Defendant McDaniels.

Filed Feb. 4, 1920. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [87]

Thereafter, on July 24, 1920, judgment was duly entered herein, in the words and figures following, to wit: [100]

In the District Court of the United States, District of Montana.

#699.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Defendants.

Judgment.

This cause came on regularly for trial on the 4th day of February, 1920, the plaintiff being represented by Edward C. Day, United States Attorney for the District of Montana, and W. W. Patterson, Assistant United States Attorney for the District of Montana, and the defendants George B. Kirby and United States Fidelity and Guaranty Company being represented by M. S. Gunn, Esq., O. King Grimstad, Esq., and O. F. Goddard, Esq., and the defendant Charles McDaniels being represented by Hugh Thomas Carter, Esq., and said

cause was thereupon tried to the court sitting without a jury, a jury having been waived by a stipulation of all parties theretofore filed herein. Testimony was introduced on behalf of the plaintiff and the defendants, and thereafter oral and written arguments were made by counsel for both sides. Thereafter and on the 23d day of July, 1920, the court made its findings herein in writing and handed down its decision, which said findings and decision are on file herein, and in which findings the Court found in favor of the plaintiff and against all the defendants in the sum of Thirty-one Thousand Three Hundred and Fifty-six Dollars ($31,356.00), with interest thereon at the rate of eight per cent (8%) per annum from and after February 1, 1918, and plaintiff's costs herein, and in said decision ordered judgment entered accordingly. [101]

WHEREFORE, by virtue of the law and by reason of the premises,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover of and from said defendants George B. Kirby, Charles McDaniels and United States Fidelity and Guaranty Company, a corporation, the sum of Thirty-seven Thousand Five Hundred Eighty-five and 40/100 Dollars ($37,585.40), together with plaintiff's costs and disbursements in this action taxed in the sum of Three Thousand Eight Hundred Twenty-two and 66/100 Dollars ($3,822.66).

Judgment rendered and entered this 24th day of July, 1920.

[Seal] C. R. GARLOW,
Clerk U. S. District Court, District of Montana.

[102]

Thereafter, on November 13, 1920, defendants Geo. B. Kirby and U. S. F. & G. Co. filed their bill of exceptions herein, being, in the words and figures following, to wit: [103]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, on Behalf of the CROW TRIBE OF INDIANS,
Plaintiff,

vs.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial on the 4th day of February, 1920, without a jury,—a jury having been waived by the written stipulation of the parties filed in said cause,—the Honorable GEORGE M. BOURQUIN, United States District Judge for Montana, presiding.

Whereupon the following proceedings were had and evidence introduced, to wit:

Objection was made on behalf of defendants to the introduction of any evidence, upon the ground that the complaint does not state a cause of action, which objection was overruled and an exception noted.

Thereupon evidence was introduced on behalf of the plaintiff and defendants, from which it appeared that the average number of cattle placed and grazed upon the leased premises during the first year of the term of said lease was 8,201.45 head, the evidence showing that during part of said year the number of cattle exceeded 11,500 head. [104]

Plaintiff's Exhibit 16, offered and received in evidence as follows:

Plaintiff's Exhibit No. 16.

PROPOSAL FOR GRAZING CATTLE.

DISTRICT No. 5 CROW INDIAN RESERVATION.

(Stamp)
Office of Indian
Affairs.
Received
Nov. 29, 1915.
127376.

Submitted by George B. Kirby and Charles McDaniels.

Address—Billings, Montana.

November 23d, 1915.

We respectfully submit the following bid for the privilege of grazing cattle on District Number Five, Crow Indian Reservation, Montana, for a period of two years from February 1st, 1916, to February 1st, 1918, with the privilege of renewal for one or two years, provided the range is not needed for the Indian cattle.

Minimum amount to be paid per annum in semi-annual payments in advance—$31950.00

Subject to the conditions and specifications contained in the Department Proposals inviting bids for this district. The number of cattle to be grazed on this district to be 9,000 head, at the rate of $3.55 per head per annum, and that any cattle grazed on this district in excess of 9,000 head shall be paid for at the same rates per head per annum. [105]

In evidence of good faith please find enclosed certified check for $3,195.00.

Yours respectfully,
GEORGE B. KIRBY,
CHARLES McDANIELS.

Plaintiff's Exhibit No. 17, offered and received in evidence, is as follows:

Plaintiff's Exhibit No. 17.

WESTERN UNION.

Night Telegram.

Received at
B57UNMD Nite Govt.

Washington, D. C., Dec. 4, 1915.

George B. Kirby,
Charles McDaniels,
Billings, Montana.

Your bid for Crow District Five accepted.

SELLS, Commissioner.

1038P

Plaintiff's Exhibit No. 18, offered and received in evidence, is as follows:

Plaintiff's Exhibit No. 18.

DEPARTMENT OF THE INTERIOR.
OFFICE OF INDIAN AFFAIRS.
WASHINGTON.

Refer in reply to the following;

December 11, 1915.

45866–15.

Mr. George B. Kirby,
Mr. Charles McDaniels,
Billings, Montana.

Gentlemen:—

Your bid of $31,950 per annum for grazing privileges on Crow district No. 5 has been accepted by the Department of the Interior.

The certified check submitted with your bid has been sent to the Superintendent of the Crow Indian School with instructions to hold it until a lease has been properly executed and bonded and the first payment made. A bond in the sum of $31,950 will be required [106] and the Office would much prefer that you furnish a surety company bond, but if personal sureties are furnished it will be necessary for each of them to show that he is worth over and above all debts and liabilities not less than the amount of the bond. Please give the matter of executing the lease and furnishing the bond your prompt attention.

Very truly yours,
(Signed) CATO SELLS,
Commissioner.

Testimony of M. S. Cunningham, for Plaintiff.

M. S. CUNNINGHAM, a witness for plaintiff, was sworn and testified, in substance, as follows:

In 1916 I was general manager of the Taylor Forks Cattle Company. The company had two brands,—the Nine Quarter Circle and the U. D. During that year cattle belonging to said company were grazed on District No. 5 of the Crow Indian Reservation. We had a contract with Mr. McDaniels. In the early part of the year 1917 the Taylor Forks Cattle Company sold its cattle to the Mays Cattle Company.

Thereupon Plaintiff's Exhibit No. 19 was offered and received in evidence. Said exhibit is as follows:

Plaintiff's Exhibit No. 19.

THIS AGREEMENT, Made and entered into this 30th day of March, 1916, by and between GEORGE B. KIRBY and CHARLES McDANIELS (hereinafter styled first parties), both of Billings, Montana, and TAYLOR'S FORK CATTLE COMPANY, a Montana Corporation, of Bozeman, Montana (hereinafter styled second party), WITNESSETH:

That first parties agree to receive and furnish pasture and labor for the care of cattle for grazing on Grazing District No. 5, Crow Reservation, Montana at the times, in the manner, for the compensation and upon the conditions hereinafter specified, such cattle to be delivered by second party to first parties at Little Horn station, in Big Horn County, in the State of Montana, where [107] first parties shall accept and receive them.

Paragraph 1. 2,500 head of cattle to be delivered and received as aforesaid at any time between the date hereof and the first day of October, 1916, for which second party agrees to pay $7,500 as follows:

$500 in cash, the receipt whereof is hereby acknowledged;

$3,250 when said cattle are delivered at said Little Horn Station;

$3,750 on August 1, 1916.

$7,500 is to be paid for cattle delivered under this paragraph even if the number delivered do not equal 2,500 head, and if more than 2,500 head be delivered under this paragraph, they are to be paid for at the rate of three dollars per head.

Paragraph 2. In addition to the cattle delivered under the terms and conditions of paragraph 1 of this contract, second party may at its option deliver to first parties at any time during the year 1916, 3,000 head or more for grazing and care under the terms of this contract, for which it is to pay first parties at the rate of $5.25 per head for the period ending February 1, 1917, and which cattle first parties are to receive.

Paragraph 3. If 3,000 or more head of cattle are delivered and received under paragraph 2 of this contract, second party to be credited upon the amount to be paid for their pasturage, grazing, etc., an amount equal to thirty-nine and one-half cents per head, computed on the number of cattle delivered and received under Paragraph 1 hereof, or not less than 2500 head. It is the intention of the parties hereto that if 3000 or more cattle shall be delivered and grazed under the terms of the second paragraph of this contract, so as to make the number of cattle delivered under the terms of both the first and second paragraphs 5500 or more, that they are to be paid for at the rate of $5.25 a head [108] for the period ending February 1, 1917.

Paragraph 4. If 5500 or more head of cattle shall be grazed under the provisions of para-

graphs 1 and 2 of this contract, and second party shall desire first parties to graze 3,000 or more head of cattle for the year commencing February 1, 1917, and ending February 1, 1918, such cattle shall be received and grazed by first parties, and shall be paid for by second party at the rate of $5.25 per head per year for the year from February 1, 1917, to February 1, 1918.

Paragraph 5. In addition to the compensation to be paid for the grazing of cattle as above specified, second party is to pay for the salt fed to its said cattle while being grazed under this agreement, the amount to be paid to be determined by the cost of the salt laid down at the most convenient railroad station to said grazing district, where first parties shall receive the same and shall then bear the cost of transporting the same from said station to the place where it is fed to the cattle, and the expense of feeding the same.

Paragraph 6. Except as specified in Paragraph 1 hereof second party is to pay first parties the compensation herein agreed to be paid as follows:

For all cattle delivered under paragraphs 2 and 3 prior to August 1, 1916, one-half the compensation agreed upon herein is to be paid on delivery of said cattle at said Little Horn Station, and the remaining half on the first day of August, 1916. And for all delivered under said Paragraphs 2 and 3 after the 1st day of August, 1916, and prior to the first day of February, 1917, the compensation so agreed upon is to be paid in full on delivery of the cattle at said station.

And for all cattle delivered under the terms of paragraph 4 of this contract, half of the compensation agreed upon is to [109] be paid at the time of delivery of said cattle at said Little Horn station, and the remaining half on the 1st day of August, 1917.

Payments for salt are to be made upon settlements and accounting of the amounts furnished from time to time at the mutual convenience of the parties hereto.

Paragraph 7. Second party is to pay all taxes levied and assessed against said cattle grazed under the terms of this contract.

Paragraph 8. Cattle furnished and grazed under the terms of this contract are to be branded with one of the following brands, to wit: Thus " " on right ribs and thus " " on right ribs.

Paragraph 9. Second party is to procure federal inspection of all cattle furnished by it under this contract as a condition precedent to the acceptance of the same by first parties.

IN WITNESS WHEREOF first parties have hereunto set their hands and seals the day and year first above written, and second party by its duly authorized officers has hereunto caused its corporate name to be subscribed and its corporate seal to be affixed the day and year first above written.

(Signed) GEORGE B. KIRBY.
By C. McD. (Seal)
(Signed) CHARLES McDANIELS. (Seal)
TAYLOR'S FORK CATTLE COMPANY.
By H. C. BIERING,
President.

(Testimony of M. S. Cunningham.)

[Corporate Seal]

Attest: M. S. CUNNINGHAM,
Secretary.

The foregoing agreement is cancelled by mutual consent this 5th day of June, 1917, and full satisfaction is acknowledged.

GEO. B. KIRBY,
CHARLES McDANIELS,
By CHARLES McDANIELS,
CHARLES McDANIELS.
TAYLOR'S FORK CATTLE COMPANY.
By CARLETON B. SWIFT,
President. [110]

WITNESS.—(Continuing.) It was by reason of this contract that the cattle of the Taylor's Fork Company were placed on District No. 5.

July 3, 1917, said cattle were sold to the Mays Cattle Co.

Thereupon Plaintiff's Exhibit No. 20 was offered and received in evidence. Said exhibit is as follows:

Plaintiff's Exhibit No. 20.

AGREEMENT made and entered into by and between GEORGE B. KIRBY and CHARLES M. McDANIELS, parties of the first part, both of Billings, Montana, and TAYLOR'S FORK CATTLE COMPANY, a Montana corporation and PORTLAND CATTLE LOAN COMPANY, an Oregon corporation, parties of the second part, WITNESSETH:

WHEREAS the parties of the first part are the lessees under a certain lease made by Evan W. Estep, Superintendent of Crow Indian School, as party of the first part for and on behalf of the Crow Tribe of Indians occupying and residing upon the Crow Reservation, and under said lease have the right to graze cattle on what is known as District Number 5 in the said Crow Reservation, Montana, from the 1st day of February, 1916, to the 31st day of January, 1918, with privilege of renewing the said lease for a further period of one or two years under the terms and conditions as therein stated; And,

WHEREAS, by agreement made under date the 30th day of March, 1916, by and between the parties of the first part and Taylor's Fork Cattle Company, the parties of the first part undertook to receive and furnish pasture and labor for the care of cattle for grazing on the said District Number 5, Crow Reservation, at certain times and for certain compensation and subject to certain conditions contained in the said agreement, to which reference is hereby made for greater particularity, and under the said last mentioned agreement Taylor's Fork Cattle Company has furnished cattle which have been pastured and grazed upon the lands aforesaid by the parties of the first part and a large number of such cattle are still upon the said grazing lands, having been received by the parties of the *first* [111] from the Taylor's Fork Cattle Company, but said agreement has been superseded and the parties thereto have agreed between themselves

that it shall be cancelled and all rights and claims, debts and demands arising out of the same shall be deemed satisfied and discharged; and,

WHEREAS, Portland Cattle Loan Company has made advances and loans to the Taylor's Fork Cattle Company and may hereafter make further advances and loans to said Taylor's Fork Cattle Company, and for protection has been in the past and may continue to be, interested in the direction of the affairs of the last-named Company;

NOW, THEREFORE, in consideration of the sum of one dollar ($1.00) paid by the parties of the second part to the parties of the first part, and in consideration of the mutual promises and agreements herein contained, the parties of the first part agree that the agreement of date the 30th day of March, 1916, hereinabove referred to, between the parties of the first part and Taylor's Fork Cattle Company shall be deemed and conclusively presumed cancelled and of no force or effect, and that no obligations either for the payment of money or otherwise shall be binding upon the parties to the said agreement, or to any stockholder or officer of either of the corporations herein mentioned.

Charles M. McDaniels above named shall, so long as Portland Cattle Loan Company is a creditor of Taylor's Fork Cattle Company receive from the latter Company a monthly payment of one hundred dollars ($100.00), which shall be accepted and received by him in full for any and all claims and demands he may have or hereafter claim against either the Portland Cattle Loan Company or Tay-

lor's Fork Cattle Company for services or compensation, and in consideration thereof he agrees to perform such duties as may be required of him in looking after the cattle. [112]

As long as Portland Cattle Loan Company is a creditor of Taylor's Fork Cattle Company, the parties of the first part undertake to receive and furnish pasture and labor for the care of all cattle furnished by the second parties for grazing on the said District Number 5, so far as they may legally do so under their lease hereinabove mentioned, and any and all extensions and renewals or new leases of said Grazing District obtained by them or either of them, and will in all respects comply with the terms and conditions of the said lease and any and all extensions and renewals thereof and of any such new lease or leases.

Taylor's Fork Cattle Company, in consideration thereof, agrees to advance McDaniels' portion of all rentals required by the lease and his portion of all moneys required to be paid or contributed by him to meet the obligations of the parties of the first part to the lessor or to the Government of the United States or any officer thereof, and to the Indians, individually and collectively, as provided by the terms of the said instrument. Any rebates received, however, by the said McDaniels shall be credited back on the advances so made and returned to the parties of the second part. All expenses of rounding up and counting cattle, salting, etc., shall be paid by the Taylor's Fork Cattle Company.

The parties of the second part or either of them, may withdraw from this agreement on not less than three months' notice to said McDaniels, and at the end of the period indicated in such notice the agreement shall be deemed terminated. It shall also be terminated by failure of the second parties to make the advances and payments required hereunder.

Nothing contained herein shall authorize or empower the parties to do any act or thing in violation of the terms of the original lease referred to above, but on the other hand both parties will cooperate to fulfil all the terms and conditions of [113] such lease, and will in all things conform to the laws and regulations governing the grazing of cattle upon the Grazing District herein mentioned.

EXECUTED by the parties hereto this 5th day of June, 1917.

(Signed) GEO. B. KIRBY and
CHARLES McDANIELS.
(Signed) By CHARLES McDANIELS.
(Signed) CHARLES McDANIELS.

TAYLOR'S FORK CATTLE COMPANY.
(Signed) By CARLETON B. SWIFT,
President.

PORTLAND CATTLE LOAN COMPANY.
(Signed) By W. P. DICKEY,
President.

Plaintiff's Exhibits Nos. 21 and 22 were also offered and received in evidence, said exhibits being as follows:

Plaintiff's Exhibit No. 21.

MEMORANDUM OF AGREEMENT, made and entered into this 3d day of July, 1917, by and between GEORGE B. KIRBY and CHARLES McDANIELS, parties of the first part and MAYS CATTLE COMPANY, a corporation, party of the second part, WITNESSETH:

WHEREAS, the parties of the first part, Lessees in a certain lease made by Evan W. Estep, superintendent of Crow Indian School as party of the first part for and on behalf of Crow Tribe of Indians occupying and residing upon the Crow Reservation, under and pursuant to action of the Council of the Tribe, speaking for the Tribe, duly authorizing the leasing of what is known as District No. 5 of Crow Indian Reservation, which instrument is dated December 17, 1915, and by the terms of the said lease the lessees are entitled to graze cattle upon the lands of the said District No. 5 subect to the terms and conditions as prescribed in the said lease; And,

WHEREAS, among other stipulations in the said lease it is provided that the lessees may not assign their privilege under the said lease or sublet without the consent of the Indian Department [114] being first obtained but that this provision is not intended to prevent them from taking stock to pasture of like kind to their own when they have not sufficient number of their own to fill in the mini-

mum number allowed their district and where they handle such stock with their men and outfit, provided due notice is given to the Reservation authorities of the numbers thus taken with the names of the owners; And,

WHEREAS, the term of said lease expires on the 31st day of January, 1918, but it is therein provided that if at the expiration thereof the District is not needed for Indian stock the lessees shall have the privilege of renewing it for one or two years under the same terms and conditions;

NOW, THEREFORE, the parties of the first part, in consideration of one dollar and in consideration of the compensation to be paid Charles McDaniels as hereinafter provided, undertake to receive and furnish pasture and labor for the care of cattle that may be furnished by the party of the second part for the grazing on the said District No. 5 so far as they may legally do so under their lease hereinabove mentioned, and also for any and all extensions and renewals or new leases of the said grazing district or any other grazing district in Crow Indian Reservation obtained by them or either of them and will in all respects comply with the terms and conditions of the said leases and any and all extensions or renewals thereof and of any such new lease or leases.

The party of the second part agrees to advance McDaniels' portion of all rentals required by the lease and his portion of any and all moneys required to be paid or contributed by him to meet the obligations of the parties of the first part to the

lessor or to the government of the United States or any officers thereof and to the Indians individually and collectively, as provided by the terms of the said instrument. Any rebates received, however, [115] by the said McDaniels shall be credited back on the advances so made and returned to the party of the second part. All expense of rounding up and counting cattle, salting, etc., shall be paid by the party of the second part.

In further consideration, therefor, the party of the second part agrees to employ the said McDaniels to look after its cattle upon the said grazing district at a salary of $150.00 per month, such employment to begin on July 1st, 1917, and the salary to be paid monthly so long as the cattle of the party of the second part are upon the said grazing district, and this agreement is kept and performed by the parties of the first part or either of them.

On his part, the said McDaniels promises and agrees to give such attention to the business aforesaid as may be necessary to fully protect the interest of the party of the second part and also that he will use his best endeavors to get all possible and proper renewals and extensions of the said lease, complying in all respects with the requirements, terms and conditions that may be prescribed therein.

Nothing contained herein shall authorize or empower the parties to do any act or thing in violation of the terms of the original lease referred to above, but on the other hand both parties will cooperate to fulfil all the terms and conditions of such lease and will in all things conform to the laws and

regulations governing the grazing of cattle upon the grazing district herein mentioned.

EXECUTED by the parties the day and year first above written.

GEO. B. KIRBY,
By C. McDANIELS. (Seal)
CHARLES McDANIELS. (Seal)
MAYS CATTLE COMPANY.
By F. P. MAYS,
President.

Attest: CHAS. H. CAREY,
Secretary.

In presence of ——————————.
——————————. [116]

Plaintiff's Exhibit No. 22.

AGREEMENT between GEORGE B. KIRBY and CHARLES McDANIELS, parties of the first part, and TAYLOR'S FORK CATTLE COMPANY, a Montana corporation, and PORTLAND CATTLE LOCAN COMPANY, an Oregon corporation, parties of the second part:

For and in consideration of the sum of one dollar and other valuable considerations, it is agreed by the parties hereto that all contracts and agreements heretofore or now existing between the parties or any of them relating to the grazing or care of cattle upon District No. 5, Crow Indian Reservation in Montana, and particularly a certain agreement bearing date June 5th, 1917, between the parties hereto, have been abrogated and are hereby cancelled and annulled.

(Testimony of M. S. Cunningham.)

Each party releases the other party from all claims, debts, demands and liabilities of whatsoever name, nature or kind arising or that may accrue out of the agreement above mentioned or any agreement or understanding relating to grazing or care of cattle upon Crow Indian Reservation.

EXECUTED this 3d day of July, 1917.

GEORGE B. KIRBY.

By C. McDANIELS. (Seal)

CHARLES McDANIELS. (Seal)

TAYLOR'S FORK CATTLE COMPANY.

By CARLETON B. SWIFT,

President.

Attest: DAMILLIS,

Temporary Secretary.

PORTLAND CATTLE LOAN COMPANY.

By W. P. DICKEY,

President.

Attest: DAMILLIS,

Secretary.

In the presence of ——————————.

——————————. [117]

The witness CUNNINGHAM further testified as follows:

I met Mr. Kirby in Billings about the 22d of March, and had a talk with him about putting cattle on the reservation. We talked about the price and the conditions, and he said he might consider making a deal with me for stuff that I wanted to

(Testimony of M. S. Cunningham.)

ship, beef stuff. We talked around $3.50 a head. I told him that after I had moved the beef off I would like to put some more cattle on, and he said he might make a deal to put about three thousand more on, but we didn't come to any definite understanding. He said he expected to go to Denver, and told me to look at the range and then to see McDaniels. I went to the reservation and looked it over and then came back and saw McDaniels. Mr. Kirby never gave me his consent to put on 5,500 head at one time. I never had a talk with him about that. My talk with Kirby was to the extent of 2,500 at one time and 3,000 head at another time, when the first 2,500 head would be taken off. Mr. Kirby was not present when either of these contracts with McDaniels was made. I never talked them over with Kirby. The only talk I ever had with Kirby was the one I had the first time in Billings. I did all the business with McDaniels. I never talked it over with Kirby, because I was doing the business with McDaniels, and "I thought that what Mr. Kirby didn't know wouldn't hurt him any." I do not think Mr. Kirby knew anything about these contracts until the fall of 1917. The Taylor's Fork Company put about twenty-five or twenty-six hundred head on District No. 5 in April, 1916. All of these cattle that we could find were taken off and shipped in August. In the fall of 1916 I was in western Montana gathering cattle and shipping and McDaniels was down at the reservation receiving them.

Testimony of George B. Kirby, in His Own Behalf.

GEORGE B. KIRBY, one of the defendants, was sworn and testified, in substance, as follows:

In the spring of 1916 I had a conversation with Mr. Cunningham. [118] He was looking for summer range for something like 2,500 head of steers. I told him about the reservation and we agreed upon a price at that time, provided the range suited him. The understanding was that the 2,500 head should be shipped off during the summer, with the privilege of putting on 3,000 head in the place of the 2,500. I didn't learn about the written contract until some time in the fall of 1917. The Taylor's Fork Company paid me $3,250.00 in the spring of 1916. I first learned that the Mays Cattle Company was grazing cattle on the leased premises by agreement with McDaniels some time in the forepart of the summer of 1917. I never authorized McDaniels to make any contract with reference to putting cattle on District No. 5, other than the contract that I made with Cunningham in the spring of 1916, wherein I agreed to let Cunningham put on 2,500 at one time and 3,000 when the 2,500 should be removed. I explained to Mr. Estep, the superintendent of the Crow Agency, and also to Mr. Wilcott, the livestock superintendent, about the Taylor's Fork Company putting more cattle on the leased premises than I had agreed upon. I also complained to the manager of the Taylor's Fork Company,—Mr. Cunningham,—I think some time

(Testimony of George B. Kirby.)

in February, 1917. He said he had made a bid for a lease and if he got it he would move all of his cattle onto the district leased. I was down south in the fall of 1916, when the Taylor's Fork cattle were put on the reservation. I never saw this contract with the Taylor's Fork Cattle Company, Exhibit No. 19, or knew that such a contract had been made, until I saw the contract in Mr. Gunn's office the other day. I never gave anyone any authority to put any cattle on the leased premises except the 2,500 head and the 3,000 head I mentioned.

The witness testified on cross-examination:

I think it was some time in December that I notified Mr. Estep, the superintendent of the Crow Agency, that the Taylor's Fork Company had put on more cattle than my agreement called for. I didn't [119] protest at the time the Taylor's Fork Company were putting the cattle on, because I didn't know about it until about Thanksgiving, 1916. I think it was shortly after Thanksgiving that I went down by the Agency and had a talk with Mr. Estep about these cattle. I fulfilled my duty when I notified the office. Mr. Cunningham had a right, under my contract with him, to graze 3,000 head on the reservation. In 1916 the Taylor's Fork Cattle Company paid me in May, $3,250.00 and in August $7,987.50 In 1917 Mr. McDaniels paid one-half of the rental on the lease and I paid the other half. I paid the rental for 1916. I never received, for any cattle grazed by either

(Testimony of George B. Kirby.)

the Taylor's Fork Cattle Company or the Mays Cattle Company on the leased premises, any payments except the $3,250.00 and the $7,987.50 paid in 1916.

The witness testified on redirect examination.

My contract with Cunningham provided for 2,500 head at $3.50 a head for the summer, and if the 3,000 head were put on at $5.25, to be estimated by the year.

Testimony of Charles Kirby, for Defendants.

CHARLES KIRBY, a witness for the defendants, being duly sworn, testified:

I am the brother of George Kirby. I was at the reservation when the Taylor's Fork Cattle Company cattle were received in the fall of 1916. I was helping receive the cattle. I helped receive up to about 3,000 head. My brother was not there. I was representing him. When I found that they were exceeding the 3,000 head, I objected to Mr. McDaniels and withdrew my outfit and quit.

There is further testimony of the foregoing and other witnesses, but the foregoing is sufficient to disclose a conflict upon the issue in reference to the placing and grazing of the cattle of the Taylor's Fork Cattle Company and of the Mays Cattle Company on the leased premises, and relating to the defendant, Kirby, having knowledge of, consenting to, or acquiescing in, the grazing of said cattle, and relating to the payments made by said companies,

(Testimony of Charles Kirby.)

or either thereof, or the [120] said McDaniels, for grazing said cattle.

The evidence was uncontradicted that the number of cattle grazed on the leased premises by the Taylor Forks and Mays Cattle Companies was largely in excess of the number mentioned in the conversation between Kirby and Cunningham, and the excess for the second year found by the Court was made up in a substantial part of the said cattle so grazed on said premises by said companies in excess of the said number mentioned in said conversation, the Court holding that the issue presented by said conflict of testimony was immaterial.

After the conclusion of the testimony on Feb. 5, 1920, and on July 6, 1920, a motion was made in behalf of the defendant Kirby for a decision and judgment in his favor, upon the grounds and for the reasons following:

1. That the complaint does not state a cause of action.

2. That the action is upon contract, and the right of recovery, if any, is in tort.

3. That there is no allegation of reasonable value of grazing the excess number of cattle.

4. That the excess number of cattle were placed on the leased premises without the knowledge, consent or approval of said defendant.

5. That there is no evidence to warrant any recovery against him.

Said motion was overruled by the Court, and an exception noted.

A motion was made July 16, 1920, also in behalf of the defendant, United States Fidelity and Guaranty Company, for a decision and judgment in its favor, upon the grounds and for the reasons following:

1. That the complaint does not state a cause of action.

2. That the action is on contract and the right of recovery, if any, is in tort.

3. That the agreement to pay for the excess at the rate of $4.50 per head is invalid and unenforceable.

4. That there has been no violation of the contract upon which the action is based, but the excess number of cattle, if any, placed on the land were placed thereon in violation of law.

5. That the evidence does not warrant any recovery against this defendant.

Said motion was overruled by the Court and an exception noted.

On July 16, 1920, the defendants, Kirby and the United States Fidelity [121] and Guaranty Company, requested the Court, in writing, to make findings of fact as follows:

1. That the excess cattle, if any, grazed on the leased premises were placed and grazed thereon without the knowledge, consent or approval of the defendant Kirby.

2. That averaging for the two year term of the lease all cattle grazed thereon, there was not an average of 9,000 head.

3. That averaging all cattle grazed for the first

year of the lease, there was an average of less than 9,000 head.

4. That averaging all cattle grazed during the second year of the lease, there was an average of not exceeding 12,471 head.

Said requests were each and all denied by the Court, and an exception taken and noted to the action of the Court in denying such requests.

On July 2, 1920, the Court made its findings of fact and conclusions of law as follows:

(Title of Court and Title of Cause.)

Herein, the Court finds for plaintiff and against defendants: That during the first year of the term there was no excess grazing; that during the second year of the term there was excess grazing by defendants Kirby and McDaniels to the extent of 7,656 head for the year. And accordingly the Court concludes plaintiff is entitled to judgment with interest of 8% per annum from Jan. 31, 1918, and costs against all the defendants, and for the principal sum of $34,452 against defendants Kirby and McDaniels, and for the principal sum of $31,950 against defendant Surety Company. The attached decision is made a part hereof.

July 2, 1920.

BOURQUIN, J.

At the same time, the Court rendered and filed an opinion in said cause, as follows: [122]

(Title of Court and Title of Cause.)

This is an action for the benefit of the Crow tribe of Indians, to recover unpaid rentals for tribal

lands, pursuant to a "grazing lease" duly made to defendants Kirby and McDaniels.

The term was for two years, from Feb. 1, 1916, to Jan. 31, 1918, for a rental of $31,950 per annum, payable semi-annually (Feb. 1 and Aug. 1) in advance. This was paid, but plaintiff sues for "excess" rental, denied by defendants.

The lease (whether lease or license is immaterial) provides that "it is further agreed that the number of cattle to be grazed * * * shall be limited to an average of 9,000, the maximum number at any one time not to exceed 11,500 head, and that any excess over and above such maximum number shall be paid for at the rate of $4.50 per head." There is further provision that defendants shall deliver to proper authority, about the close of June and December of each year, affidavits "setting forth the number of livestock being grazed under this lease and the changes in such number for the six months previous"; that defendants will not assign or sublet without previous consent of the department, and may take to graze others' cattle when necessary "to fill in the minimum number allowed in their district."

Ambiguity, obscurity and mistake in the lease are apparent. Taken as a whole, however, in view of circumstances, the situation, subject, object, reason, good faith, the intent of the parties and disclosed by the language of the lease is that for the rental of $31,950 per annum, defendants could graze any number of cattle up to the equivalent of 9,000 head thruout each year taken separately, and that for

any in excess thereof defendants would pay $4.50 per head grazed the equivalent of a year. The language of the lease that this $4.50 per head is payable for "any excess over and above such maximum number" does not necessarily import only cattle over [123] and above 11,500 head, the last antecedent and maximum *eo nomine,* but consistent with the writing and construction can be and is taken to import cattle over and above 9,000 head, the first antecedent and also a maximum tho not in terms so characterized. Nine thousand head are the maximum for the year as a whole, the principal thing, and the 11,500 head are the maximum at any time (and for such time as will serve to accomplish the 9,000 maximum), an incidental thing. Subsequent construction, whether in writing or oral by the Commissioner is, as usual, immaterial. The contract is not his nor is he the maker of it, it may be added, nor can he change it. It is clear neither party intended any free grazing, that both intended to best serve all interests by restricting grazing to the equivalent of 9,000 head for the year as near as possible, and to enable defendants to accomplish this with fluctuating numbers, to permit grazing up to 11,500 head for sufficient time, taking others' cattle to graze if necessary to that end, to "fill in" the maximum number, not minimum number (for there is no minimum) as mistakenly written in the lease, and that dealing with an annual crop, the parties dealt with each year complete and separate from the other. This is also indicated by defendants' written offer to lease (accepted by plaintiff) for two

years at a minimum amount of $31,950 per year, "the number of cattle to be grazed on this district to be 9,000 head, at rate of $3.55 per head per annum, and that any cattle grazed on this district in excess of 9,000 head shall be paid for at the same rates per head per annum," which offer can be properly considered.

See Simpson vs. U. S., 199 U. S. 399;

U. S. vs. Bethlehem Steel Co., 205 U. S. 118.

Defendants' argument that by the terms of the lease they are to pay only for excess over 11,500 head, and that for all between 9,000 head and 11,500 head they would be amenable only to the relevant [124] criminal law applicable to trespassers, is untenable.

There is an obvious distinction between the tenant who occupies premises without his lease, a trespass merely, and the tenant who exceeds the stipulated extent of user of premises leased, a breach of covenant. Even if no rent is fixed for such excess, the tenant is liable, in an action of contract and upon the lease, for damages which can be arrived at by reasonable value of the excess user.

In respect to the extent of excess grazing, the plaintiff alone epitomizes the evidence, and its figures are undisputed.

Therefrom it appears there was no excess grazing the first year, but that for the second year the excess is equivalent to 7,656 head. And the Court so finds.

Accordingly, judgment will be entered for plaintiff and against defendants for $34,452, interest at

8% from Jan. 31, 1918, and costs, save that against defendant surety company the principal sum is limited to its undertaking $31,950.

Interest is due the beneficiaries in this contract as to any others in any other, as compensatory damages for nonpayment when due, and at the legal rate of the place of payment. The lease silent when excess rents payable, invokes the common law, payment at end of term.

July 2, 1920.

BOURQUIN, J.

Said findings and decision having been vacated by the Court, pursuant to stipulation of the parties, the said Court, on July 23, made and adopted other findings of fact and conclusions of law in said cause, as follows:

(Title of Court and Title of Cause.)

Herein, the Court finds for plaintiff and against defendants; that during the first year of the contract involved there were no excess cattle grazed by defendants; that during the second year [125] thereof there were excess cattle grazed by defendants, over and above the contract maximum average of 9,000 head for the year, equivalent to 6,968 head for one year. And accordingly, the Court concludes plaintiff is entitled to recover of and from defendants the sum of $31,356.00, together with interest thereon at the rate of 8% per annum from and after February 1, 1918, and costs.

The decision of July 2, 1920, is this day adopted and refiled, and it and the decision of even date

herewith are made parts hereof, so that in accordance with the decision of the Supreme Court they may be considered upon any review.

July 23, 1920.

BOURQUIN,
Judge.

At the same time the Court rendered and filed its written opinion and decision as follows:

(Title of Court and Title of Cause.)

In this case decision was filed July 2, 1920, and pursuant to stipulation of the parties the decision was vacated on July, 1920, for inadvertent rendition before defendants' briefs had been filed.

And now the Court adopts the said decision throughout save to the extent herein modified, and orders it herewith filed anew.

The defendants fail to dispute the accuracy of plaintiff's computations from the evidence, but labor to distinguish Kirby's cattle and those he sanctioned, from all others, a wholly useless undertaking.

Cattle shown to have been put on the district by the permittees or lessees or sanctioned or ratified by them, the burden shifts to them to show removed, confined in feed lots, or died, and numbers and time thereof. In view of the nature of the contract, defendants would be entitled to credit for cattle removed in any manner.

The affidavits are not vital. They would not conclude either party if duly filed, nor does failure to file them estop defendants.

In respect to cattle in feed lots (only second year

is material), the evidence so far as can be relied upon and persuasive, [126] leads to the conclusion that the equivalent of 300 head for the year are all that ought to be credited to defendants, are all fairly proven; and that number will be so credited.

In respect to the winter losses, 5% are credited for the second year, upon the like view of the evidence. Note, the agents in charge did not dispute claims so far as made before suit, when they must have had knowledge by observation of general losses.

A credit of 495 head for one-half month is also given, appearing on Ex. 4, January 16, 1918, and omitted from plaintiff's computations.

Accordingly, it is found that the number of excess cattle for the second year is 6,968 head, and the principal sum due thereon is $31,356.00.

Local statute law affects not Government and Indian lands and contracts.

More important than the Indian commissioner's belated, mistaken, immaterial, fugitive, *quasi* construction of the contract, is Estep's (who executed it for the Indians) of November 1, 1916. Even otherwise, the commissioner's construction would not estop to compel defendants to pay for value received upon a true construction of the contract.

Defendants' belated request for findings and motion for judgment, are denied.

July 23, 1920.

BOURQUIN,
Judge.

That thereafter, and on the 24th day of July, 1920, by consent of the attorneys for plaintiff, an order was made and entered in said cause, granting the defendants sixty days within which to prepare, and serve their bill of exceptions.

And now, come the defendants, Kirby and the United States Fidelity and Guaranty Company, and presents the foregoing as their bill of exceptions to the action of the court in the particulars [127] therein set forth, and prays that the same may be settled, allowed and signed and made a part of the record in said cause.

Dated this 13th day of September, 1920.

GRIMSTAD & BROWN and
GUNN, RASCH & HALL,
Attorneys for Defendants, Kirby and United States Fidelity and Guaranty Company. [128]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, on Behalf of the CROW TRIBE OF INDIANS,
Plaintiff,

vs.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Defendants.

Certificate of Judge to Bill of Exceptions.

ORDER.

United States of America,
District of Montana,—ss.

I, George M. Bourquin, Judge of the United States District Court for the District of Montana, do hereby certify that the foregoing is a full, true and correct bill of exceptions in said action, and that the recitals therein regarding the testimony and evidence are true and correct. The same is now allowed, approved and signed, and ordered filed and made a part of the record in said cause.

Dated this 13th day of November, 1920.

BOURQUIN,
Judge.

Due personal service of within bill of exceptions made and admitted and receipt of copy acknowledged this 13th day of September, 1920.

EDWARD C. DAY,
U. S. Atty.,
And W. W. PATTERSON,
Asst. U. S. Atty.,
Attorneys for Plaintiff.

Filed Nov. 13th, 1920. C. R. Garlow, Clerk. [129]

Thereafter, on December 4th, 1920, defendants' bill of exceptions in the matter of costs was duly settled and filed herein, being in the words and figures following, to wit: [130]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, on Behalf of the CROW TRIBE OF INDIANS,
Plaintiff,

vs.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Defendants.

Bill of Exceptions in re Costs.

BE IT REMEMBERED that within the proper time the plaintiff's memorandum of costs and necessary disbursements, duly verified, was served and filed, together with a notice of the time when application would be made to the clerk of said court to tax said costs, in accordance with Rule 70 of said court; that included in said memorandum were witness fees and mileage of seventeen persons, who were subpoenaed as witnesses for the plaintiff, and were present in court during the trial of said cause, but who were not called or sworn and did not testify and were not used as witnesses; that there were also included in said memorandum items of expenses of six persons, who were Government employees and

were subpoenaed as witnesses for the plaintiff, and who attended upon the trial of said cause, but who were not called or sworn and did not testify and were not used as witnesses; that included in said memorandum were items of fees and mileage of eleven persons subpoenaed as witnesses for the plaintiff, and who attended the trial of said cause from points or places without the State of Montana, and distant more than one hundred miles from the City of Helena, where said trial was had; that in said memorandum [131] the mileage of each of said witnesses was claimed for the full distance traveled by him; that included in said memorandum were also the items of marshal's fees for serving subpoenas upon said witnesses who appeared but did not testify.

That at the time specified in said notice, when application would be made to the clerk to tax said costs, the defendants, George B. Kirby and the United States Fidelity and Guaranty Company, appeared and presented their objections, in writing, to the items of witness' fees and mileage for said witnesses who did not testify and were not used, items of marshal's fees for service of subpoenas upon said witnesses, and the items of mileage for said witnesses who were subpoenaed and attended from points without the State of Montana and distant more than one hundred miles from where said Court was held, which said objections, with the grounds thereof, were as follows:

(Title of Court and Cause.)

Now come the defendants, George B. Kirby and United States Fidelity and Guaranty Company, and object to the taxation against them, or either of them, of certain items of costs included in the memorandum of costs and disbursements of the plaintiff herein. Said items to which the objections are made, and the grounds of such objections, are as follows:

1. The items of witness fees and mileage of Ernest Howard, W. H. Willingham, Ben Spotted Horse, Tog Stovall, Ed. Schroeder, Henry G. Small, F. M. Heinrich, John Kennedy, Martha Chatham, David Pease, Ben Pease, Dominic Stevens, W. H. Bunston, Bob Stovell, Chas. Heinrich, P. M. Cotton, Three Bears, and items of expense of Bud Tucker, Packs The Hat, Geo. Hunter, O. M. Boggess, Frank Biggs, and Evan W. Estep.

Each of said items is objected to upon the ground and for the reason that none of said parties above named testified as [132] a witness in said cause.

2. Objection is made to the items of mileage claimed in excess of 200 miles for each of the following witnesses: Tog Stovall, Charles Heinrich, L. L. Nelson, W. P. Rickey, Ray Powers, E. C. Woodley, Charles Tompkins, E. L. Dana, Ed. Loeffler, P. M. Cotton, and H. E. Haworth.

Said objection is upon the ground and for the reason that all of said witnesses reside without the State of Montana, and each attended from his place of residence, and a distance of more than 100

miles from Helena, where the trial of the above-entitled case was had.

* * * * * * * * *

5. Objection is made to the items of Marshal fees for serving subpoenas upon the witnesses who did not testify as above set forth, upon the ground and for the reason that such expenses were unnecessary.

* * * * * * * * *

Dated this 1st day of September, 1920.

GRIMSTAD & BROWN,
GUNN, RASCH & HALL,
Attorneys for the Defendants, Kirby and United States Fidelity and Guaranty Company.

That at said hearing of said application to tax said costs by said clerk the plaintiff introduced affidavits and offered other proof of good faith in subpoenaing said witnesses who did not testify, from which it appeared that if some of said witnesses had testified their testimony would have been cumulative and corroborative, and that the other of said witnesses were intended for use in rebuttal, but it was deemed unnecessary to call them in view of the testimony for the defendants.

That the clerk of said Court sustained said objections 1 and [133] 5, and overruled said objection 2. Whereupon a motion to retax said costs was made in behalf of the plaintiff and a motion to retax was also made in behalf of the defendants, Kirby and the United States Fidelity and Guaranty Company, the notice of motion by the plaintiff specifying the rulings of the clerk in sustaining

objections 1 and 5 as the rulings excepted to, and the notice of motion by the defendants specifying the ruling of the clerk in overruling objection No. 2 as the ruling excepted to. Said motions came on regularly for hearing before the Court, upon the papers and evidence used before the clerk, and the Court, after due consideration thereof, reversed the rulings of the clerk in sustaining objections 1 and 5, and affirmed the ruling of the clerk in sustaining objection 2, and costs were taxed accordingly.

The order and opinion of the Court in the matter was in writing, and is as follows:

(Title of Court and Cause.)

In the matter of retaxation of costs, plaintiff's motion to reverse the clerk's ruling in relation to objections one and five is granted, and in relation to objection ten is denied. Defendant's like motion in relation to objections seven and eight is granted, and in relation to objection two is denied. And costs are taxed accordingly.

Nov. 27, 1920.

BOURQUIN, J.

MEMO.

In reference to items not foreclosed by previous rulings, which ought to be followed until overruled by the Appellate Court, plaintiff's unused witnesses were fairly material and necessary in proper forecast and preparation for trial. A party may anticipate an opponent's case and prepare to meet and rebut it—should do so. As to the marshal's fees where service not made, it is a party's duty to know

where his witnesses are and to direct the [134] officer. He cannot send the latter on a roving commission and charge the expense, especially when the officer fails, to his opponent.

Filed Nov. 27, 1920. C. R. Garlow, Clerk.

And now come the defendants, Kirby and the United States Fidelity and Guaranty Company, and present the foregoing as their bill of exceptions to the action of the Court in the particulars therein set forth, and pray that the same may be settled, allowed and signed and made a part of the record in said cause.

Dated this 4 day of December, 1920.

GRIMSTAD & BROWN,
GUNN, RASCH and HALL,
Attorneys for Defendants, Kirby and United States Fidelity and Guaranty Company.

It is hereby stipulated that the foregoing proposed bill of exceptions may be allowed, approved and signed by the Judge of said court.

Dated this 4th day of December, 1920.

GEORGE F. SHELTON,
Attorney for Plaintiff,
GRIMSTAD & BROWN,
GUNN, RASCH & HALL.
Attorneys for Defendants, Kirby and United States Fidelity and Guaranty Company. [135]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, on Behalf of the CROW TRIBE OF INDIANS,
Plaintiff,

vs.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Defendants.

Certificate of Judge to Bill of Exceptions in re Costs.

ORDER.

United States of America,
District of Montana,—ss.

I, GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, do hereby certify that the foregoing is a full, true and correct bill of exceptions in said action, and that the recitals therein are true and correct. The same is now allowed, approved and signed, and ordered filed and made a part of the record in said cause.

Dated this 4th day of December, 1920.

BOURQUIN,
Judge.

Filed December 4, 1920. C. R. Garlow, Clerk.

[136]

Thereafter, on December 6th, 1920, assignment of errors was duly filed herein, in the words and figures following, to wit: [139]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, on Behalf of the CROW TRIBE OF INDIANS,
Plaintiff,

vs.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Defendants.

Assignment of Errors.

Come now the above-named defendants, George B. Kirby, Charles McDaniels and the United States Fidelity and Guaranty Company, and present and file, with their petition for a writ of error herein, their assignment of errors as follows:

1. The District Court of the United States for the District of Montana erred in overruling the objection of the defendants to the introduction of any evidence in support of the amended complaint, which objection was based upon the ground that the said complaint does not state facts sufficient to constitute a cause of action.

2. The said Court erred in rendering judgment against these defendants, and thereby holding and

deciding that the amended complaint states a cause of action.

3. The said Court erred in holding and deciding that the contract, upon which the action is based, provides for payment at the rate of $4.50 per head for the average number of cattle grazed upon the leased premises each year in excess of 9,000 head.

4. The Court erred in holding and deciding that the contract requires the averaging of the number of cattle for each year instead of for two years, the full term of the lease. [140]

5. The Court erred in overruling objection No. 1 of the defendants, Kirby and United States Fidelity and Guaranty Company, to the taxation as costs of the fees and mileage of witnesses for the plaintiff who did not testify.

6. The Court erred in overruling objection No. 2 of the defendants, Kirby and United States Fidelity and Guaranty Company, to the taxation as costs of mileage in excess of 200 miles of witnesses for the plaintiff who attended from without the State and from points distant more than 100 miles from where the Court was held.

7. The Court erred in overruling objection No. 5 of the defendants, Kirby and United States Fidelity and Guaranty Company, to the taxation as costs of the marshal's fees and expenses for serving subpoenas upon the witnesses for the plaintiff who did not testify.

And the defendants, George B. Kirby and United States Fidelity and Guaranty Company, further

present and file their separate assignment of errors, as follows:

1. The said Court erred in holding and deciding that the contract requires the averaging of the number of cattle for each year, instead of for two years, the full term of the lease.

2. The Court erred in holding and deciding that the defendant, Kirby, is liable for the grazing of the cattle of the Taylors Fork Cattle Company, grazed upon the leased premises by permission of the defendant, McDaniels, and without the knowledge, consent or approval of the defendent, Kirby.

3. The Court erred in holding and deciding that the issue or question whether the defendant, Kirby, had knowledge of, consented to, or acquiesced in, the grazing of the cattle of the Taylors Fork Cattle Company upon the leased premises by permission of the defendant, McDaniels, was immaterial, and in declining to [141] find upon said question or issue as requested.

4. The Court erred in overruling objection No. 1 of the defendants, Kirby and United States Fidelity and Guaranty Company, to the taxation as costs of the fees and mileage of witnesses for the plaintiff who did not testify.

5. The Court erred in overruling objection No. 2 of the defendants, Kirby and United States Fidelity and Guaranty Company, to the taxation as costs of mileage in excess of 200 miles of witnesses for the plaintiff who attended from without the State and from points distant more than 100 miles from where the Court was held.

6. The Court erred in overruling objection No. 5 of the defendants, Kirby and United States Fidelity and Guaranty Company, to the taxation as costs of the marshal's fees and expenses for serving subpoenas upon the witnesses for the plaintiff who did not testify.

And the defendant, Kirby, presents and files his separate assignment of errors, as follows:

1. The Court erred in holding and deciding that he is liable for the grazing of the cattle of the Taylors Fork Cattle Company, grazed upon the leased premises by permission of the defendant, McDaniels, and without his knowledge, consent or approval.

2. The Court erred in holding and deciding that the issue or question whether or not he had knowledge of, consented to, or acquiesced in, the grazing of the cattle of the Taylors Fork Cattle Company upon the leased premises, by permission of the defendant, McDaniels, was immaterial, and in declining to find upon said question or issue as requested by him.

3. The Court erred in denying his motion, at the close of the testimony, for a decision and judgment in his favor. [142]

4. The Court erred in holding and deciding that the amended complaint states a cause of action.

And the defendant, United States Fidelity and Guaranty Company, presents and files its separate assignment of errors, as follows:

1. The said Court erred in denying the motion of said defendant, at the close of the testimony, for a decision and judgment in its favor.

2. The said Court erred in holding and deciding that the amended complaint states a cause of action against said defendant.

3. The said Court erred in holding and deciding that this defendant is liable for the payment of an amount in excess of the annual rentals specified and provided to be paid by the contract.

WHEREFORE, defendants, jointly and severally, prays that said judgment be reversed.

Dated this 4th day of December, 1920.

GRIMSTAD & BROWN,
GUNN, RASCH & HALL,
Attorneys for Defendants, Kirby & United States Fidelity & Guaranty Company.

HUGH THOS. CARTER,
Attorney for Defendant, Charles McDaniels.

Filed Dec. 6, 1920. C. R. Garlow, Clerk. [143]

[Endorsed]: No. 3607. United States Circuit Court of Appeals for the Ninth Circuit. George B. Kirby, Charles McDaniels, and United States Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error, vs. The United States of America, for and on Behalf of the Crow Tribe of Indians, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed December 13, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, for and on Behalf of the CROW TRIBE OF INDIANS,
Defendant in Error.

Stipulation Re Printing of Record.

It is hereby stipulated that the parts of the record necessary for consideration of the errors assigned and intended to be relied on are as follows:

1. Amended complaint with exhibits thereto (Record, pp. 62–77).
2. Answers of plaintiffs in error to amended complaint (Record, pp. 78–85).
3. Stipulation waiving trial by jury (Record, pp. 86, 87).
4. Judgment (Record, pp. 100–102).
5. Bill of exceptions to alleged errors of the Court during trial (Record, pp. 103–129).
6. Bill of exceptions to action of court in taxing costs (Record, pp. 130–136).
7. Assignment of errors (Record, pp. 139–143).

...ision

Dated this 14th day of December, 1920.

GRIMSTAD & BROWN,
GUNN, RASCH & HALL,
Attorneys for Plaintiffs in Error, Kirby and U. S. F. & G. CO.

HUGH THOS. CARTER,
Attorney for Plaintiff in Error, Charles McDaniels.

GEORGE F. SHELTON,
U. S. District Attorney,
Attorney for Defendant in Error.

[Endorsed]: #3607. United States Circuit Court of Appeals, Ninth Circuit. George B. Kirby et al., Plaintiffs in Error, vs. United States of America, etc., Defendant in Error. Stipulation. Filed Dec. 18, 1920. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3607.

GEORGE B. KIRBY, CHARLES McDANIELS, and UNITED STATES Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA for and on Behalf of the CROW TRIBE OF INDIANS, Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Montana.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Messrs. Gunn, Rasch & Hall,
Helena, Montana;
Messrs. Grimstad & Brown,
Billings, Montana;
Hugh Thomas Carter, Esq.,
Helena, Montana,
Attorneys for Plaintiffs in Error.

Geo. F. Shelton, Esq.,
United States Attorney,
Helena, Montana,
Attorney for Defendant in Error.

At a Stated Term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Friday, the Twenty-fifth Day of February, in the Year of Our Lord One Thousand Nine Hundred and Twenty-one.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
The Honorable William H. Hunt, Circuit Judge.
The Honorable Charles E. Wolverton, District Judge.

No. 3607.

GEORGE B. KIRBY, CHARLES MCDANIELS, and UNITED STATES Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA for and on Behalf of the CROW TRIBE OF INDIANS, Defendant in Error.

Order of Submission.

Ordered above-entitled cause argued by Mr. O. King Grimstad, counsel for the plaintiffs in error Kirby and United States Fidelity & Guaranty Company, and by Mr. George F. Shelton, United States Attorney, and counsel for the defendant in error, and submitted to the Court for consideration and decision.

At a Stated Term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit Held in the Court-room Thereof, in the City and County of San Francisco, in the State of California, on Monday, the Second Day of May, in the Year of Our Lord One Thousand Nine Hundred and Twenty-one.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
The Honorable Erskine M. Ross, Circuit Judge.
The Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

By direction of the Honorable William B. Gilbert, and William H. Hunt, Circuit Judges, and the Honorable Charles E. Wolverton, District Judge, rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a Judgment or Decree be filed and recorded in the Minutes of this Court in each of the causes in accordance with the opinion filed therein:

* * * * * * *

No. 3607.

* * * * * * *

GEORGE B. KIRBY, CHARLES MCDANIELS, and UNITED STATES Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA for and on Behalf of the CROW TRIBE OF INDIANS, Defendant in Error

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 3607.

GEORGE B. KIRBY, CHARLES MCDANIELS, and UNITED STATES Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA for and on Behalf of the CROW TRIBE OF INDIANS, Defendant in Error.

Before Gilbert and Hunt, Circuit Judges, and Wolverton, District Judge.

On December 17, 1915, in accordance with the provisions of Section 3 of the Act of Congress of February 28, 1891 (26 Stat. 794), as amended by the Act of August 15, 1894 (28 Stat. 305), and in pursuance of the resolution of the Crow Tribal Council of July 29, 1915, a grazing lease of tribal lands was entered into between the plaintiffs in error and the defendant in error, which lease was approved by the Secretary of the Interior on January 11, 1916. The lease was for a term of two years, and it provided for an annual rent of $31,950, payable in equal semi-annual installments. It contained the following provision: "It is further agreed that the number of cattle to be grazed on the territory described above shall be limited to an average of nine thousand (9,000) head, the maximum number at any one time not to exceed eleven thousand, five hundred (11,500) head, and that any excess over and above such maximum number shall be paid for at the rate of $4.50 per head for each and every head of such excess number, in addition to the rental herein named." The complaint of the defendant in error, hereinafter called the plaintiff, alleged the defendants had kept cattle on the lands largely in excess of the number specified in the lease, setting forth the number thereof, and judgment was demanded for $141,049 with interest. The cause was tried before the court without a jury, and the court found that there was no excess grazing during the first year, but that during the second year there were excess cattle of 6,968 head, and that the sum due therefor to the plaintiff was $31,356. Judgment was entered accordingly for that sum, with

interest at eight per cent per annum from and after February 1, 1918, and costs.

Gilbert, Circuit Judge, after stating the case: The merits of the controversy depend upon the construction of the clause of the contract which is quoted above. The court below construed it to mean that for the rental of $31,950 per annum the defendants could graze any number of cattle up to the equivalent of 9,000 head throughout each year taken separately, and that for any excess of that number the defendants were to pay $4.50 per head grazed during the equivalent of a year. Said the court: "The language of the lease that this $4.50 per head is payable for 'any excess over and above such maximum number, does not necessarily import only cattle over and above 11,500 head, the last antecedent and maximum eo nomine, but consistent with the writing and construction can be and is taken to import cattle over and above 9,000 head, the first antecedent and also a maximum although not in terms so characterized. Nine thousand head are the maximum for the year as a whole, the principal thing, and the 11,500 are the maximum at any time (and for such time as will serve to accomplish the 9,000 maximum), an incidental thing." We agree with that construction of the contract. It is obvious that there was error in one phrase of the instrument, but, notwithstanding the error, the true intention of the contracting parties is not difficult to ascertain. It was clearly not their intention that there should be any free grazing, and the construction contended for by the defendants would result in free grazing for all cattle in excess of 9,000 and under 11,500. The intention of the contracting parties is made clear by referring to the written offer which the defendants submitted preliminary to the contract, and which may be properly taken into consideration in construing the instrument. United States v. Bethlehem Steel Co., 205 U. S. 105, 118; Northwestern Terra Cotta Co. v. Caldwell, 234 Fed. 491, 499. In that proposal the defendants wrote: "The minimum amount to be paid per annum, in semi-annual payments in advance $31,950. * * * the number of cattle to be grazed on this district to be 9,000 head, at the rate of $3.55 per head per annum and that any cattle grazed on this district in excess of 9,000 head shall be paid for at the same rates per head per annum." The defendants contend that the provision for the payment of $4.50 per head was intended either as a penalty or as liquidated damages for violation of the contract in grazing an excess number of cattle on the leased premises, that in providing for such payment no provision is made about the average number of cattle, and that the true construction is that for all cattle placed on the leased land in excess of the maximum number the lessee should pay $4.50 per head even if the cattle were on the land but for a single day, a rate so disproportionate to the value of the grazing privilege that it must be considered as a penalty, and it is argued that it is immaterial whether the $4.50 rate be regarded as a penalty or as liquidated damages, in view of Sections 5054 and 5055 of the Revised Codes of Montana, 1907. The contention cannot be sustained. The provision for the payment of $4.50 per head is neither in the nature of a penalty nor liquidated damages.

It is a stipulated sum to be paid for a specified privilege. The contract does not bind the defendants to pasture no more cattle per annum than the lowest number therein specified. The plaintiff does not sue for breach of a contract. There is no allegation in the complaint upon which either a penalty or liquidated damages can be predicated. There was in fact no breach of contract. The agreement left the defendants at liberty to pasture as many cattle on the lands as they might see fit to place thereon, up to the limit of 11,500, but it provided that for cattle in excess of 9,000 and for the exercise of such privilege, they should pay an increased rate of pasturage per head. The rate was increased doubtless on the theory that the presence of such excess cattle would result in some injury to the pasture, but that does not mean that the rate so fixed is compensation for damage. It was but payment for that which the plaintiff parted with and the defendants received. In view of the construction which we have given to the contract, it becomes unnecessary to discuss the assignment that the court erred in holding that the Surety Company was liable on the bond for the excess number of cattle grazed. Nor do we find that the court below erred in construing the contract to authorize the averaging of the cattle for each year separately instead of for a two year period. The contract was clearly divisible into two year periods. The rent was apportioned to each year, and was payable for each year, and the conclusion is reasonable that the provision in regard to extra payment for excess cattle applied to each year.

It is contended that as the contract expressly limits the number of cattle which may be grazed on the leased premises, the grazing thereon of any excess number was without the consent of the Crow Tribe of Indians, and in violation of Section 2117 of the Revised Statutes, and that the agreement to pay for the excess cattle could impose no liability, it being an agreement to pay for violating the statute by placing cattle on the reservation without the consent of the tribe. But it does not appear from the record that any provision of the lease was inserted therein without authority from the Crow Indians. The complaint alleges and the answer admits that the lease was made in pursuance of a resolution of the Crow Tribal Council, and that the same was approved by the Secretary of the Interior. The lease itself recites that it was made on behalf of the Crow Tribe of Indians under and pursuant to the action of the Council of the tribe. The leased lands were subject to lease, under Sec. 3 of the Act of February 28, 1891, 26 Stat. 794. The lands had been "bought and paid for" within the meaning of that statute. Strawberry Valley Cattle Co. v. Chipman, 45 Pac. 348. In Maricopa & Phœnix Railroad v. Arizona, 156 U. S. 347, the court, answering the contention that it did not appear by the record that the consent of the Indians had been given to a grant of a right of way over their land, said: "In the first place, as the company has taken the rights granted by the statute, the legal presumption of duty performed (omnia rite, etc.) requires us to assume that the consent was given in accordance with law. And again, the company having assumed and exercised rights which it could possess only by virtue of such

consent, cannot be permitted to aver its own wrong-doing, trespassing, and violation of the statute in order to escape its just share of the burden of taxation." In Cincinnati & Tex. Pac. Ry. v. Rankin, 241 U. S. 319, 327, the court said: "The law presumes that every man in his private and official character, does his duty until the contrary is proved. It will presume that all things are rightly done, unless the circumstances of the case overturn this presumption." It is contended that it was error to hold the defendant Kirby liable for cattle belonging to certain cattle companies which were grazed on the leased premises by permission of McDaniels, and without Kirby's knowledge or consent. The evidence leads clearly to the inference that notwithstanding that in the spring of 1916 Kirby may have been ignorant of the arrangement made by McDaniels to pasture the cattle of others on the leased lands, he acquired such knowledge before the end of that year, and that he was aware of McDaniels' acts in so pasturing other cattle during the second year of the lease, the year in which the court below found liability to have been incurred to pay the rental of $4.50 per head. There is no evidence of ouster of Kirby by McDaniels, and ever if there were, their joint liability under the lease would not be affected thereby. Kendall v. Carland, 5 Cush. 74; Goshorn v. Steward, 15 W. Va. 657; Glenn v. Dungey, 4 Exch. 61.

Error is assigned to the ruling of the court below in allowing as costs the mileage of witnesses who attended the trial from without the state, and from points more than 100 miles from where the court was held. The question of practice raised by the assignment is one upon which the courts have differed. In the First Circuit it is held that a witness is entitled to the whole mileage without limit to the 100 miles, whether or not he resides within the jurisdiction. United States v. Sanborn, 28 Fed. 302; The City of Augusta, 80 Fed. 297; The Gov. Ames, 187 Fed. 40; Eastern S. S. Corp. v. Great Lakes Dredge & D. Co., 256 Fed., 497. The rule is to the contrary in the Second Circuit. Buffalo I. & S. Co. v. Providence & S. S. S. Co., 29 Fed. 237; The Syracuse, 36 Fed. 830. Also in the Third Circuit. The Progresso, 48 Fed. 239. And in the Fourth Circuit. Schloss Iron & Steel Co. v. South Carolina & G. R. Co., 75 Fed. 106. Also in the Sixth Circuit. The Vernon, 36 Fed. 113; Burrow v. Kansas City etc. R. Co., 54 Fed. 278. Also in the Seventh Circuit. Eastman v. Sherry, 37 Fed. 844. Also in the Eighth Circuit. Pinson v. Railroad Co., 54 Fed. 464; Griggsby Const. Co. v. Louisiana & N. W. R. Co., 123 Fed. 751; United States v. Green, 196 Fed. 255. In the Ninth Circuit, in Hunter v. Russell, 59 Fed. 964, Judge Knowles followed the rule of the First Circuit, but in Hanchett v. Humphrey, 93 Fed. 895 Judge Hawley ruled otherwise, and held that mileage is taxable for a witness from any point within the district and for a distance of 100 miles if the witness came from a point at a greater distance, and without the district. In United States v. Southern Pac. Co., 172 Fed. 909, Judge Bean followed the ruling in Hanchett v. Humphrey. In United States v. Southern Pac. Co., 230 Fed. 270, Judge Trippell held likewise. In neither of the last two cases was mention made of the decision of this court

in Jessie D. Carr Land & Livestock Co. v. United States, 118 Fed. 821, in which Judge De Haven, speaking for the court said: "The appellant's motion to strike from the bill of costs the amount claimed by the appellee for mileage and fees of certain witnesses who came from without the state and more than 100 miles from the place of trial, was properly denied," citing United States v. Sanborn, 28 Fed. 299. Upon that decision the plaintiff in the present suit relies. We are of the opinion that the remarks of the court in that case should not be held decisive of the question here involved. The ruling was made not on a motion to re-tax the costs, but on a motion to strike out the costs taxed as mileage and for expenses of witnesses. It does not appear that the question whether or not the witnesses were entitled to mileage for more than 100 miles was presented or discussed. Judge Hawley participated in the decision notwithstanding his prior ruling in Hanchett v. Humphrey. We think it should not stand in the way of adopting the rule which is sustained by the weight of authority, as well as by the weight of reason, that mileage is taxable in the Federal Court only for the distance that could be reached by a subpœna, and we so hold. But we think there was no abuse of discretion in taxing as costs the mileage and fees of witnesses who did not in fact testify, and in taxing as costs the fees and expenses of the marshal in serving subpœnas upon them. It is shown by the bill of exceptions that the witnesses were subpœnaed in good faith, and that their testimony was deemed material to the issues involved. Clark v. American Dock & Imp. Co., 25 Fed. 641; Burrow v. Kansas City, Ft. S. & M. R. Co., 54 Fed. 278.

The cause is remanded to the court below with instructions to re-tax the costs of the mileage of witnesses in accordance with the foregoing opinion. In other respects the judgment is affirmed.

Endorsed: Opinion. Filed May 2, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3607.

GEORGE B. KIRBY, CHARLES MCDANIELS, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA for and on Behalf of the CROW TRIBE OF INDIANS, Defendant in Error.

Judgment.

In Error to the District Court of the United States for the District of Montana.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Montana and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the cause be, and hereby is remanded to the said District Court with instructions to re-tax the costs of the mileage of witnesses in accordance with the views expressed in the opinion of this Court, and in other respects the judgment of the said District Court is affirmed.

[Endorsed:] Judgment. Filed and Entered May 2, 1921, F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3607.

GEORGE B. KIRBY, CHARLES McDANIELS, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA for and on Behalf of the CROW TRIBE OF INDIANS, Defendant in Error.

Petition of Plaintiffs in Error for a Writ of Error.

To the Honorable George M. Bourquin, United States District Judge for the District of Montana:

George B. Kirby, Charles McDaniels and United States Fidelity and Guaranty Company, plaintiffs in error above named, feeling themselves aggrieved by the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered against them and in favor of the United States on the 2nd day of May, 1821, hereby pray that a writ of error may be allowed them from the Supreme Court of the United States to the said Circuit Court of Appeals, and herewith present their assignment of errors.

Petitioners further pray that an order of supersedeas may be entered herein, pending the final disposition of the cause, and that the amount of security may be fixed by the order allowing the writ of error.

GRIMSTAD & BROWN AND
GUNN, RASCH & HALL,
Attorneys for Plaintiffs in Error George B. Kirby and the United States Fidelity and Guaranty Company.
HUGH THOS. CARTER,
Attorney for Plaintiff in Error Charles McDaniels.

Endorsed: No. 3607. United States Circuit Court of Appeals for the Ninth Circuit. George B. Kirby, Charles McDaniels, and United States Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error, vs. The United States of America, For and on Behalf of the Crow Tribe of Indians, Defendant in Error. Petition of Plaintiffs in Error for a Writ of Error. Filed Jul. 2, 1921, F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3607.

GEORGE B. KIRBY, CHARLES MCDANIELS, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA for and on Behalf of the CROW TRIBE OF INDIANS, Defendant in Error.

Assignment of Errors.

Come now the above named Plaintiffs in Error and present and file with their petition for a Writ of Error their assignments of error as follows:

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding and deciding that the contract upon which the action is based provides for the payment at the rate of $4.50 per head for the average number of cattle grazed upon the leased premises each year, in excess of 9,000 head.

2. The said court erred in holding and deciding that the agreement in said contract to pay for any excess was an agreement to pay a stipulated sum for a specified privilege.

3. The said court erred in holding and deciding that the provision for the payment of $4.50 per head is neither in the nature of a penalty nor liquidated damages.

4. The court erred in holding and deciding that there was no breach of the contract.

5. The court erred in holding and deciding that said contract authorizes the averaging of the excess for each year, instead of for the full period of the lease.

6. The said court erred in holding and deciding that the excess number of cattle for which a recovery was had were placed and grazed on the leased premises by consent of the Crow Tribe of Indians.

And the Plaintiffs in Error, George B. Kirby and the United States Fidelity and Guaranty Company, further present and file their separate assignment of errors, as follows:

1. The said court erred in holding and deciding that the plaintiff in error, Kirby, is liable for the grazing of the cattle of the Taylor Forks Cattle Company, grazed upon the leased premises by permission of the plaintiff in error, McDaniels, and without the knowledge, consent or approval of Kirby.

And the defendant, the United States Fidelity and Guaranty Company, for its separate assignment of errors, says:

1. That the said court erred in holding and deciding that the plaintiff in error, the United States Fidelity and Guaranty Company, is liable on its bond or undertaking as surety for the payment for any excess number of cattle.

GRIMSTAD & BROWN AND
GUNN, RASCH & HALL,
Attorneys for the Plaintiffs in Error Kirby and the United States Fidelity and Guaranty Company.
HUGH THOS. CARTHER,
Attorney for the Plaintiff in Error McDaniels.

Due service of foregoing Assignment of Errors acknowledged and receipt of copy thereof admitted, this 29th day of June, 1921.

JOHN L. SLATTERY,
United States Attorney.

Endorsed: 3607. United States Circuit Court of Appeals for the Ninth Circuit. George B. Kirby, Charles McDaniels, and United States Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error, vs. The United States of America, for and on Behalf of the Crow Tribe of Indians, Defendant in Error. Assignment of Errors. Filed Jul. 2, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3607.

GEORGE B. KIRBY, CHARLES MCDANIELS, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA for and on Behalf of the CROW TRIBE OF INDIANS, Defendant in Error.

Order.

Let a writ of error issue from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit, as prayed for in the petition of the above named plaintiffs in error.

And it is further ordered that the writ of error, allowed as above stated, operate as a supersedeas, upon the plaintiffs in error furnishing a bond in the penal sum of $45,000.00, conditioned according to law, to be approved by me.

Dated this 29 day of June, 1921. BOURQUIN,
United States District Judge for the District of Montana.

Endorsed: United States Circuit Court of Apepals for the Ninth Circuit. George B. Kirby, Charles McDaniels, and United States

Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error, vs. The United States of America, for and on Behalf of the Crow Tribe of Indians, Defendant in Error. Order. Filed Jul. 2, 1921. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3607.

GEORGE B. KIRBY, CHARLES McDANIELS, and UNITED STATES Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA for and on Behalf of the CROW TRIBE OF INDIANS, Defendant in Error.

Know all men by these presents:

That we, George B. Kirby, Charles McDaniels and the United States Fidelity and Guaranty Company, as Principals, and Maryland Casualty Co., as Surety, are held and firmly bound unto the United States of America in the sum of Forty-five Thousand Dollars ($45,000.), to be paid to the said United States, for which payment well and truly to be made we bind ourselves and our heirs, personal representatives, successors and assigns jointly and severally by these presents:

Dated this 29th day of June, 1921.

Whereas, the above named George B. Kirby, Charles McDaniels and the United States Fidelity and Guaranty Company have prosecuted a writ of error from the Supreme Court of the United States, to reverse the judgment rendered in the above entitled cause by the United States Circuit Court of Appeals for the Ninth Circuit:

Now, therefore, the condition of this obligation is such, that if the said George B. Kirby, Charles McDaniels and the United States Fidelity and Guaranty Company of Baltimore, Maryland, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

GEORGE B. KIRBY,
By CARL RASCH,
One of His Attorneys.

[SEAL.] UNITED STATES FIDELITY & GUARANTY COMPANY,
By CLINTON S. PRICE,
Its Attorney in Fact.

CHARLES McDANIELS,
By HUGH THOS. CARTER,
His Attorney, Principals.

[SEAL.] MARYLAND CASUALTY CO.,
By LOUIS F. SCHROEDER,
Its Attorney in Fact, Surety.

Approved:
BOURQUIN, *J.*

Endorsed: No. 3607. United States Circuit Court of Appeals, Ninth Circuit. George B. Kirby, Charles McDaniels and United States Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error, v. The United States of America, for and on behalf of the Crow Tribe of Indians, Defendant in Error. Bond on Writ of Error. Filed Jul. 2, 1921. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3607.

GEORGE B. KIRBY, CHARLES McDANIELS, and UNITED STATES Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA for and on Behalf of the CROW TRIBE OF INDIANS, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Return to Writ of Error from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-four (94) pages, from and including 1 to and including 94, to be a full, true and correct copy of the complete record in the above entitled cause, including the assignment of errors and of all proceedings had in the above-entitled cause, and of all papers, including the opinion filed in said Circuit Court of Appeals in the above entitled case, as the originals thereof remain on file, and appear of record in my office, and that the same constitute the transcript of record and return to the writ of error to the Supreme Court of the United States in the above entitled cause.

Attest my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, in the State of California, this 7th day of July, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

No. —.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Court of Appeals before you, between George B. Kirby, Charles McDaniels and the United States Fidelity and Guaranty Company, Plaintiffs in Error, and the United States of America, for and on behalf of the Crow Tribe of Indians, Defendant in Error, a manifest error hath happened, to the great damage of the said George B. Kirby, Charles McDaniels and the United States Fidelity and Guaranty Company, Plaintiffs in Error, as by their complaint appears:

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, D. C., on the 29th day of August next, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct these errors what of right and according to the laws and customs of the United States should be done.

Witness The Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States, the 29th day of June, 1921, the one hundred and forty-fifth year of the Independence of the United States of America.

[Seal of the United States District Court, District of Montana.]

C. R. GARLOW,
Clerk of the United States District Court
for the District of Montana, Ninth Circuit.

Service of the within and foregoing Writ of Error and receipt of a copy thereof is hereby admitted this 29th day of June, 1921.

JOHN L. SLATTERY,
United States Attorney,
Attorney for Defendant in Error.

[Endorsed:] Docketed. No. 3607. United States Circuit Court of Appeals for the Ninth Circuit. George B. Kirby, Charles McDaniels, and United States Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error, vs. The United States of America, for and on Behalf of the Crow Tribe of Indians, Defendant in Error. Writ of Error. Filed Jul- 2, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk. Grimstad & Brown, Billings, Montana, Gunn, Rasch & Hall, Helena, Montana, Attorneys for Kirby and U. S. F. & G. Co. Hugh Thomas Carter, Helena, Montana, Attorney for Charles McDaniels.

Return to Writ of Error.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

Dated at San Francisco, California, this 7th day of July, A. D. 1921.

THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE NINTH CIRCUIT.

[Seal of the United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

No. 3607.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

To the United States for and on behalf of the Crow Tribe of Indians and the United States District Attorney for the District of Montana, its Attorney:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, D. C., within sixty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the United States Circuit

Court of Appeals for the Ninth Circuit, wherein George B. Kirby, Charles McDaniels and United States Fidelity and Guaranty Company are Plaintiffs in Error and the United States of America, for and on behalf of the Crow Tribe of Indians is Defendant in Error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Bourquin, United States District Judge for the District of Montana, this 29 day of June, 1921.

BOURQUIN,
United States District Judge for the District of Montana.

Service of the foregoing Citation is hereby acknowledged, this 29" day of June, 1921.

JOHN L. SLATTERY,
United States District Attorney for the District of Montana.

[Endorsed:] Docketed. No. 3607. United States Circuit Court of Appeals for the Ninth Circuit. George B. Kirby, Charles McDaniels, and United States Fidelity and Guaranty Company, a Corporation, Plaintiffs in Error, vs. The United States of America, for and on behalf of the Crow Tribe of Indians, Defendant in Error. Citation on Writ of Error. Filed Jul- 2, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk. Grimstad & Brown, Billings, Montana, Gunn, Rasch & Hall, Helena, Montana, Attorneys for Kirby and U. S. F. & G. Co., Hugh Thomas Carter, Helena, Montana, Attorney for Charles McDaniels.

Endorsed on cover: File No. 28,377. U. S. Circuit Court Appeals, 9th Circuit. Term No. 422. George B. Kirby, Charles McDaniels, and United States Fidelity and Guaranty Company, plaintiffs in error, vs. The United States of America for and on behalf of the Crow Tribe of Indians. Filed July 22, 1921. File No. 28,377.

Office Supreme Court, U. S.
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WM. R. STANSBURY
CLERK

No. 126

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY and GUARANTY COMPANY, a Corporation,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, for and on behalf of the Crow Tribe of Indians,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR, KIRBY AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

M. S. GUNN,
CARL RASCH,
E. M. HALL,
O. KING GRIMSTAD, AND
ROCKWOOD BROWN,

Attorneys for Plaintills in Error, George B. Kirby and United States Fidelity and Guaranty Company.

No. 422

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

GEORGE B. KIRBY, CHARLES McDANIELS and UNITED STATES FIDELITY and GUARANTY COMPANY, a Corporation,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, for and on behalf of the Crow Tribe of Indians,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR, KIRBY AND UNITED STATES FIDELITY AND GUARANTY COMPANY.

Statement of Case.

The defendant in error, for and on behalf of the Crow Tribe of Indians, made and entered into a contract with the plaintiffs in error, George B. Kirby and Charles McDaniels, for the grazing of cattle upon a part of the Crow Indian Reservation, (Record, p. 6). The grazing privilege granted by the contract was for the period of two years from the first day of February, 1916, to the 31st day of January, 1918. The contract

provided for the payment of $31,950.00 each year, designated as rental, for the privilege granted. The United States Fidelity and Guaranty Company, one of the plaintiffs in error, executed a bond, conditioned that Kirby and McDaniels would comply with their contract, (Record, p. 14). One of the agreements of the contract is as follows:

> "It is further agreed that the number of cattle to be grazed on the territory described above *shall be limited to an average of nine thousand* (9000) *head, the maximum number at any one time not to exceed eleven thousand, five hundred* (11,500) *head, and that any excess over and above such maximum number shall be paid for at the rate of* $4.50 *per head for each and every head of such excess number, in addition to the rental herein named.*" (Record, p. 9).

The action is upon the contract and is to recover for an alleged excess number of cattle grazed at the rate of $4.50 per head. A recovery was sought against the United States Fidelity and Guaranty Company, as surety. The annual rental of $31,950.00, for the term of the lease, was paid, (Record, pp. 3 and 4).

The plaintiffs in error answered separately, and denied that any excess cattle were grazed, (Record, pp. 17 to 22). A jury trial was waived, by written stipulation filed, (Record, p. 23), and a trial was had before the court. The court found that there were no excess cattle grazed during the first year, but that during the second years there were excess cattle grazed "over and above the contract maximum average of 9000 head for the year, equivalent to 6968 head for one year," (Record, p. 56). The court concluded that plaintiff was entitled to recover $31,356.00, besides interest and costs. The recovery allowed was at the rate of $4.50

per head for the 6968 head. Judgment was rendered for the sum of $37,540.00, besides costs, taxed at $3,822.66, (Record, p. 24).

It was contended for the plaintiffs in error that the language of the contract "any excess over and above such maximum number," has reference to an excess over 11,500 head, and that the grazing of any number "at any one time" in excess of 11,500, or, of an average number in excess of 9000, was not authorized by the contract. It was further contended that the $4.50 per head, which the contract provides should be paid for any excess over and above the maximum number, is either a penalty or was intended as liquidated damages, and that, even though considered as liquidated damages, no recovery could be had at the rate of $4.50 per head, in view of Sections 5054 and 5055 of the Revised Codes of Montana of 1907. The trial court declined to accept such construction, and construed the contract to authorize the grazing of any number of cattle and to provide for payment at the rate of $4.50 per head for any average number in excess of 9000 grazed upon the leased premises.

Evidence was introduced in behalf of plaintiffs in error, Kirby and the Surety Company, tending to show that a substantial part of the excess number of cattle, which the court found had been grazed upon the leased premises, were the cattle of the Taylor's Fork and Mays cattle companies, and were placed and grazed on said premises by permission of McDaniels, and without the knowledge, consent or approval of Kirby. It was contended for Kirby and the Surety Company that they should not be held liable for the grazing of such cattle. The court, however, declined to consider this evidence, and held that Kirby and the Surety Company,

as well as McDaniels, are liable for any cattle grazed by consent of McDaniels, and without the knowledge, consent or approval of Kirby. It was further contended for plaintiffs in error that, in arriving at the excess number of cattle, the number should be averaged for the two-year period; but the court held otherwise, and determined the excess by averaging the number for each year separately. It was also contended for the Surety Company that there is no liability on the bond for any excess number of cattle grazed. This contention was overruled, and judgment was rendered against the Surety Company for the full amount for which judgment was rendered against Kirby and McDaniels.

The case was taken by writ of error to the Circuit Court of Appeals for the Ninth Circuit. In that court errors were assigned to the rulings of the trial court, above set forth, (Record, p. 67). The appellate court accepted the trial court's construction of the contract, and held that no error had been committed by the trial court, except in allowing as costs mileage of witnesses who attended from without the State of Montana, and more than one hundred miles from the place of trial. The trial court was instructed to retax the costs to conform to the rulings thus made. In other respects the judgment was affirmed, (Record, pp. 76 to 80). The case is before this court on writ of error to review the judgment of the Circuit Court of Appeals.

SPECIFICATON OF ERRORS.

1. The Circuit Court of Appeals for the Ninth Circuit erred in construing the contract, upon which the action is based, to authorize the grazing of any number of cattle and to provide for payment at the rate of $4.50 per head for the average number grazed each year in excess of 9000 head.

2. The court erred in deciding that plaintiff in error, Kirby, is liable for cattle grazed upon the leased premises by permission of McDaniels, and without the knowledge, consent or approval of Kirby.

3. The court erred in holding that the contract authorizes the averaging of the excess for each year, instead of for the full period of the lease.

4. The court erred in deciding that the United States Fidelity and Guaranty Company, is liable on its bond, as surety, for the payment for any excess number of cattle grazed upon the leased premises.

ARGUMENT AND AUTHORITIES.

The Circuit Court of Appeals erred in construing the contract to authorize the grazing of any number of cattle, and to provide for payment at the rate of $4.50 per head for the average number grazed each year in excess of 9000:

The contract provides:

> "It is further agreed that the number of cattle to be grazed on the territory described above *shall be limited to an average of nine thousand*

> (9000) *head, the maximum number at any one time not to exceed eleven thousand, five hundred* (11,500) *head, and that any excess over and above such maximum number shall be paid for at the rate of* $4.50 *per head for each and every head of such excess number, in addition to the rental herein named.*"

The Circuit Court of Appeals in its opinion in discussing the contract, said:

> "The court below construed it to mean that for the rental of $31,950 per annum the defendants could graze any number of cattle up to the equivalent of 9000 head throughout each year taken separately, and that for any excess of that number the defendants were to pay $4.50 per head grazed during the equivalent of a year. Said the court: 'The language of the lease that this $4.50 per head is payable for any excess over and above such maximum number, does not necessarily import only cattle over and above 11,500 head, the last antecedent and maximum eo nomine, but consistent with the writing and construction can be and is taken to import cattle over and above 9000 head, the first antecedent and also a maximum although not in terms so characterized. Nine thousand head are the maximum for the year as a whole, the principal thing, and the 11,500 are the maximum at any time (and for such time as will serve to accomplish the 9000 maximum), an incidental thing.' We agree with that construction of the contract."

As thus construed, the contract is made to read:

> The number of cattle to be grazed for the said yearly rental shall be limited to an average of 9000 head, and the average of any excess over this number shall be paid for at the rate of $4.50 per head.

We submit this construction is erroneous, for the following reasons:

1. By such construction there is absolutely eliminated from the contract the provision that "the maximum number at any one time not to exceed eleven thousand, five hundred (11,500) head." According to such construction, the lessees could have rightfully grazed at any one time, for the yearly rental provided to be paid, any number of cattle, provided the average number did not exceed 9000 for a year. They might have grazed twelve times 9000, or 108,000, one month, without violating the contract or incurring a liability for any additional rental.

2. Such construction applies a rate of $4.50 per head to any number of cattle less than 11,500, which makes an average number of more than 9000 for a year, notwithstanding the contract expressly declares that the $4.50 rate shall apply only to the excess over 11,500 head.

3. Such construction averages the excess number, notwithstanding the contract declares that the excess "shall be paid for at the rate of $4.50 *per head for each and every head.*" As to the annual rental of $31,950.00, it was wholly immaterial for what time an animal was on the leased premises, provided the average of all the cattle did not exceed 9000. As to the excess, however, it is expressly declared that payment shall be made "for each and every head," thus precluding the idea of averaging.

4. Such construction places no limit whatever upon the number of cattle which might have been rightfully grazed upon the leased premises.

5. Such construction treats the average number as the "maximum number," contrary to the express language of the contract. That it was the intention, by the words "such maximum number" to refer to 11,500 as the maximum number, and that no mistake was made in doing so, is apparent from the fact that the average number of 9000 head is referred to in the provision of the contract relating to "taking stock to pasture" as "the minimum number," (Record, p. 11). Furthermore, the word "such," as used in the paragraph always refers to the last antecedent.

The Circuit Court of Appeals, in support of the construction adopted, says:

> "It is obvious that there was error in one phrase of the instrument, but, notwithstanding the error, the true intention of the contracting parties is not difficult to ascertain. It was clearly not their intention that there should be any free grazing, and the construction contended for by the defendants would result in free grazing for all cattle in excess of 9000 and under 11,500."

The assumption that the construction contended for in behalf of plaintiffs in error would "result in free grazing of all cattle in excess of 9000 head and under 11,500," is wholly unwarranted for the reason that if, as we contend, the language of the contract, that "the number of cattle to be grazed * * * shall be limited to an average of nine thousand (9000) head" means what it says, then there was no authority to graze any number the average of which exceeded 9000 head, and if the lessees did graze an average in excess of 9000 head, they are liable as trespassers for such excess. As to any number grazed, the average of

which exceeded 9000, there is a liability the same as though no contract had ever been made.

Biglow *vs.* Battle, 15 Mass., 312;
Aikin *vs.* Davis, 11 Kans., 434, 440;
Litchfield *vs.* Norwood Mfg. Co., 48 N. Y. S., 496;
U. S. *vs.* Pine River Logging & Imp. Co., 89 Fed., 907;
Same Case, 186 U. S., 279, 46 L. ed., 1164;
Shiffer *vs.* Broadhead, 17 Atl., 592;
Jewell *vs.* Mahood, 84 Am., Dec. 90.

The case of Biglow vs. Battle, cited above, involved a lease or license to take a certain quantity of water, and the lessee or licensee took an excessive quantity. It was held that case was the proper remedy and not covenant. Chief Justice Parker, who delivered the opinion of the court, said:

> "But with respect to all water not granted by the lease, it is as if no lease had been made."

In the case of Aikin vs. Davis, cited above, it appeared that the plaintiff had granted to the defendant the right to flood his land by constructing a dam of a certain height. The court, in the opinion, said:

> "The plaintiff is willing that the defendants shall maintain the dam at the height that he agreed that they might, and that they may flood his land as he agreed they should, and it is only for the excess in the height of the dam, and excess in flooding his land above where he agreed that they might flood it, that he now complains, or seeks relief; and for this only the court below rendered judgment. The acts of the defendants in flooding the plaintiff's land above and beyond

where they had a right to flood it, that is, in flooding land not included in said written instrument, were unquestionably tortious. These acts were of the same nature as though no such written instrument had ever been made. The plaintiff did not obtain the right to prevent the flooding of these lands by virtue of said written instrument, but he possessed such right prior to the execution of such written instrument, and independent thereof. *Hence this action can in no sense be termed an action on contract, but it is an action founded on the tortious acts of the defendants in flooding land concerning which no contract has ever been made between the parties.*" (Italics ours).

In the case of United States vs. Pine River, etc., Co., cited above, it appeared that parties were by contract granted the privilege of taking certain timber from an Indian Reservation. They did not confine themselves to the character or quantity specified. It was held that the contract was no justification, and that they were liable as trespassers.

In the case of Shiffer vs. Broadhead, cited above, which was an action of trespass *vi et armis, de bonis asportatis, and quare clausum fregit,* the court, in the opinion, said:

"It is true they had a right of entry on the premises at the time the cutting was done, but it was not a right of entry for all purposes. It was solely for the purpose of cutting and removing such trees as, under the agreement, they had a right to cut, and nothing else. In cutting and removing other trees, which they had no right, and must have known they had no right, to cut, they became trespassers, as to such unauthorized and illegal acts, and as such they were liable in this action. The extent, or rather the basis, of

> their liability is fixed by the finding of the referee as to the value of the timber cut by them without authority so to do."

The fact that no compensation is provided for grazing an average number in excess of 9000, clearly shows that it was intended that this average number should not be exceeded. The language of the contract, that the number "shall be limited to an average of nine thousand (9000) head," and the fact that no rate or price is specified for the grazing of any average number in excess of 9000 head, argue conclusively against the construction by which an average number in excess of 9000 could be rightfully grazed on leased premises.

The Circuit Court of Appeals further said, in support of the construction adopted:

> "The intention of the contracting parties is made clear by referring to the written offer which the defendants submitted preliminary to the contract, and which may be properly taken into consideration in construing the instrument. United States vs. Bethlehem Steel Co., 205 U. S. 105, 118; Northwestern Terra Cotta Co. vs. Caldwell, 234 Fed. 491, 499. In that proposal the defendants wrote: 'The minimum amount to be paid per annum, in semi-annual payments in advance, $31,950 * * * the number of cattle to be grazed on this district to be 9000 head, at the rate of $3.55 per head per annum and that any cattle grazed on this district in excess of 9000 head shall be paid for at the same rates per head per annum.,"

The proposal was to pay for any cattle grazed "in excess of 9000" at the rate of $3.55 per annum. The contract, as written or as construed by the trial and

appellate courts, does not conform to this proposal. The proposal certainly does not evidence any intention that payment should be made for the average number in excess of 9000 at the rate of $4.50 per head.

The rule, with reference to resorting to prior negotiations in construing a contract, is stated by this court in the case of United States vs. Bethlehem Steel Co., cited by the Circut Court of Appeals, as follows:

> "It is not for the purpose of making a contract for the parties, but to understand what contract was actually made, that, in cases of doubt as to the meaning of language actually used, prior negotiations may sometimes be referred to."

We respectfully submit that in this case there can be no doubt as to the meaning of the words "shall be limited to an average of 9000 head," or as to the meaning of the words "that any excess over and above such maximum number shall be paid for at the rate of $4.50 per head," etc. No one could mistake the meaning of this language, and there is no room for construction.

This is not a suit for reformation, but an action at law. The court is required to construe the contract as written. There is a clear distinction between reformation and construction. A reformation reforms a contract to express the intention of the parties, and is a subject of equitable relief, while construction deduces the intention from the language employed. In construing a contract, the court must assume that the parties meant what they have expressed by the language used, and is powerless to make a contract for them.

In the case of Calderon vs. Atlas Steamship Co., 170 U. S., 272, this court said:

> "It is true that in cases of ambiguity in contracts, as well as in statutes, courts will lean toward the presumed intention of the parties or the legislature, and will so construe such contract or statute as to effectuate such intention; but where the language is clear and explicit there is no call for construction, and this principle does not apply. Parties are presumed to know the force and effect of the language in which they have chosen to embody their contracts, and to refuse to give effect to such language might result in artfully misleading others who had relied upon the words being used in their ordinary sense. In construing contracts words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different from that expressed.. A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the court will adopt a construction by which they would mean another thing more to his advantage. Clark, Contracts, p. 593."

See, also:

Braun *vs.* Rendering Co., 66 N. W. 196;

Union Stock Yards, etc., Co. *vs.* Western Land & Cattle Co., 59, Fed. 49;

President Suspender Co. *vs.* McWilliams, 238, Fed. 159;

Zohriant *vs.* Mengelberg, 124 N. W. 247;

Vinton Petroleum Co. *vs.* Sun Co., 230 Fed. 105.

In the opinion in the last case, it is said:

> "To adopt the construction contended for on behalf of appellee would require giving to the agreement a meaning not expressed by the language used. This is not permissible."

The Circuit Court of Appeals declined to accept the view that the $4.50 per head, provided to be paid for the excess over the maximum number, is a penalty or was intended as liquidated damages, and in its opinion said:

> "The provision for the payment of $4.50 per head is neither in the nature of a penalty nor liquidated damages. It is a stipulated sum to be paid for a specified privilege. The contract does not bind the defendants to pasture no more cattle per annum than the lowest number therein specified. The plaintiff does not sue for breach of a contract. There is no allegation in the complaint upon which either a penalty or liquidated damages can be predicated. *There was in fact no breach of contract.* The agreement left the defendants at liberty to pasture as many cattle on the lands as they might see fit to place thereon, *up to the limit of* 11,500, but it provided that for cattle in excess of 9000 and for the exercise of such privilege, they should pay an increased rate of pasturage per head." (Italics ours).

It would seem from the language of the opinion just quoted, that the court considered the contract as authorizing the grazing of an average number in excess of 9000 head "up to the limit of 11,500," and that the increased rate of $4.50 per head applied to the excess over 9000 and within the limit of 11,500. This, however, is wholly inconsistent with the judgment, which allowed a recovery at the rate of $4.50 per head for an average of 6968 head in excess of 9000.

Of course, if the rate of $4.50 applies to the average of the excess over 9000 head, and the contract limits the average number to 11,500, or limits the number at any one time to 11,500, such rate of $4.50 per head cannot apply to any number in excess of the limit of 11,500, and there is in fact no contract rate or price fixed for such excess. If we accept such construction, the grazing of more than the limit of 11,500 was not authorized by the contract, constituted a trespass and there can be no recovery therefor in this action, which is an action on the contract and to recover the contract rate.

Notwithstanding what is said by the Circuit Court of Appeals in its opinion, the fact remains that the judgment of the trial court, which allowed a recovery for an average of 6968 head in excess of 9000, or an average of 4468 head in excess of 11,500, at the rate of $4.50 per head, was affirmed by that court.

If the contract is construed to provide for payment at the rate of $4.50 per head for any average number in excess of 9000, and does not limit the number, it of course follows that the $4.50 per head is neither a penalty nor liquidated damages, but is the contract rate. On the other hand, if, as we contend, the contract limits both the average number and maximum number, and the rate of $4.50 was intended to apply to "each and every head" in excess of 11,500 grazed upon the leased premises "at any one time," the rate thus provided is clearly a penalty. According to the plain language of the contract, the rate of $4.50 applies to such excess, although the cattle constituting the excess may have been grazed upon the leased premises for only a day. The rate thus provided is so disproportionate to the value of the grazing privilege, as fixed by the contract, that it cannot be considered otherwise than as a penalty.

Sun Printing & Pub. Co. *vs.* Moore, 183 U. S. 648;

Bignell *vs.* Gould, 119 U. S. 495;

McCall *vs.* Deuchler, 174 Fed. 133;

Union Pacific R. Co. *vs.* Mitchell-Crittenden Tie Co., 190 Fed. 544.

It is, however, wholly immaterial whether the $4.50 rate is regarded as a penalty or as liquidated damages, as the validity and enforcibility of the provision with reference to any excess is determined by the law of Montana; and, according to this law, only the actual damages resulting from the grazing of such excess number are recoverable.

Section 5054 of the Revised Codes of Montana of 1907 provides as follows:

> "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

Section 5055 provides as follows:

> "The parties to a contract may agree therein upon an amount which shall be presumed to be an amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

The leased premises are situated in Montana, the contract was executed in Montana, and payment for the grazing privilege was, according to the contract, to be made to the Superintendent of the Indian School

"at Crow Agency, Montana." In other words, the contract was to be performed in this State, and it is the law of the State where the contract is to be performed that controls.

Coghlan *vs.* South Carolina R. Co., 142 U. S. 101;

Hall *vs.* Cordell, 142 U. S. 115;

Bond *vs.* John V. Farwell Co., 172 Fed. 59;

Home Land and Cattle Co. *vs.* McNamara, 145 Fed. 17;

Board of Commerce of Newport *vs.* Security Trust Co., 225 Fed. 454.

In the case last cited, which involved the question of whether an amount stipulated to be paid for the violation of a contract was liquidated damages or a penalty, the Circuit Court of Appeals for the Sixth Circuit, said:

> "But this contract was executed and was to be performed in Michigan and must be construed in the light of decisions of the Supreme Court of that State. (Citing cases). Whether in the last analysis the rule in Michigan is or is not different from that prevailing in the United States courts and generally is not of importance and we proceed to a consideration of the question in the light thrown upon it by the decisions of the Supreme Court of that State."

In this case, there is no allegation that it will be impracticable or extremely difficult to fix the actual damages. This is essential to the statement of a cause of action on a Montana contract, where it is sought to recover liquidated damages.

Deuninck *vs.* West Gal. Irr. Co., 28 Mont. 255;

Long Beach City School Dist. *vs.* Dodge, 67 Pac. 499;

Home Land & Cattle Co. *vs.* McNamara, 111 Fed. 822.

In the first case cited, the Supreme Court of Montana said:

> "It must be shown to the court by proper pleadings and competent proof that the contract falls within the provisions of Section 2244, (Sec. 5055 of the Revised Codes of Montana of 1907) *supra*. This does not depend entirely upon the contract itself. Facts must be pleaded and proven from which the court can say as a matter of law that the contract for liquidated damages is valid because 'from the nature of the case it would be impracticable or extremely difficult to fix the actual damages.' The mere stipulations of the contract are insufficient for that purpose."

In the case of Long Beach City School District *vs.* Dodge, the Supreme Court of California, after quoting the sections of the Civil Code of that State, which are identical with Sections 5054 and 5055 of the Revised Codes of Montana, said:

> "The first of these sections having declared all contracts fixing liquidated damages in advance to be void, except as provided in the next section, it is clearly incumbent upon the party seeking to recover upon such agreement to show by averment and proof that his case is within the exception; for, without an allegation bringing his case within the exception, the complaint in that regard is insufficient; the presumption being, in the absence of such allegation, that such agreement is void."

In the case of Home Land and Cattle Co. *vs.* McNamara, the court said:

> "But whether the agreement in this instance is strictly one for a penalty or for liquidated damages is not material. In either case it is made void by the Code of Montana (sections 2243, 2244) which enacts that a contract by which the amount of damages to be paid or other compensation to be made for breach of obligation is determined is to that extent void, except that 'the parties to a contract may agree upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof, when from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.' There is nothing in the record to show that the damage to the appellees by reason of the breach of the guaranty in this case could not have been ascertained without difficulty."

It should not be necessary to present argument in support of the proposition that it is neither impracticable nor extremely or otherwise difficult to fix the actual damages resulting from a violation of the contract by placing and grazing an excess number of cattle on the leased premises for a day, a month or a year.

* * * * * * * * *

Contracts made with the United States are subject to the same rules of law as contracts between individuals.

United States *vs.* Boshwich, 94 U. S. 65;

Smoot's case, 15 Wall, at page 107;

United States *vs.* Newport News Ship Building & D. D. Co., 178 Fed. 194.

In the opinion in the first case above cited, the court said:

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf."

In Smoot's case, above cited, the court said:

> "In approaching the inquiry into the effect which the action of the bureau of cavalry, in adopting these new rules for inspection, had upon the rights of the parties to this contract, let us endeavor to free ourselves from the consideration that the government was one party to the contract, and that it was for a large number of horses; for we hold it to be clear that the principles which must govern the inquiry are the same as if the contract were between individuals, and the number of horses one or a dozen instead of four thousand."

* * * * * * * * *

If, as we maintain, the contract limited the number of cattle which might be grazed on the leased premises, the placing of an excess number thereon constituted not only a trespass but a direct violation of the law of the United States relating to Indian lands, and the agreement to pay for the excess is not enforceable, because it is an agreement upon which a liability could only arise by a violation of law.

The contract recites that it was made

> "in accordance with the provisions of Section 3 of the Act of Congress approved February 28, 1891 (26 Stat. 794), as amended by the Act of Congress of August 15, 1894 (28 Stat. 305)." (Record, p. 6).

Section 3 of the Act of Congress approved February 28, 1891, as amended, provides that the lands of Indians

> "may be leased by authority of the Council speaking for such Indians * * * * * upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior."

Section 2177 of the Revised Codes of the United States provides:

> "Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock."

Construing the contract to limit the number of cattle, the placing of the excess on the district leased was without the consent of the Indians and in violation of law, and subjected whoever was responsible for the trespass to the payment of a penalty of one dollar for each animal. It follows that the agreement to pay for the excess over the number limited by the contract is an agreement to pay for a violation of law and is unenforceable.

Petrel Guano Co. *vs.* Journetta, 25 Fed. 675;

Birkett *vs.* Chatterton, 43 Am. Rep. 30;

Prescott *vs.* Battersby, 119 Mass. 285;

Pittsburg Const. Co. *vs.* West Side Belt R. Co., 154 Fed. 929.

The rule applicable to such a contract is stated by Lord Chief Justice Holt in Bartlett *vs.* Vinor, Carthew 253, as follows:

> "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute."

* * * * * * * * *

We therefore submit that the construction placed upon the contract by both the District Court and the Circuit Court of Appeals is erroneous. We further submit that, according to the contract, the $4.50 rate does not apply to any average number in excess of 9000, but applies only to "each and every head" in excess of 11,500, and is either a penalty or was intended as liquidated damages, and if liquidated damages no recovery can be had in this action, as there is no allegation that it is impracticable or extremely difficult to fix the actual damages, as required by the statute to constitute a cause of action for liquidated damages; and that, in any event, the agreement to pay for any excess is illegal and not enforceable, for the reasons stated.

II

Error was committed in holding that Kirby is liable for cattle grazed upon the leased premises, without his knowledge, consent or approval, but by permission of McDaniels.

Kirby and Cunningham, General Manager of the Taylor's Fork Cattle Company, had a conversation in the early part of 1916, in which it was agreed that the Taylor's Fork Company might place and graze on the leased premises 2500 head of cattle, which were to be removed during the summer of 1916. It was agreed that when these 2500 head were removed 3000 head of other cattle belonging to the Taylor's Fork Company might be placed on the leased premises, (Record, pp. 44 to 46). McDaniels, assuming to act for himself and Kirby, entered into a written contract with the Taylor's Fork Company for the grazing of cattle upon the leased premises, (Plaintiff's Exhibit 19, Record, p. 31). McDaniels signed Kirby's name to this contract. Pursuant to this contract the cattle of the Taylor's Fork Company were placed on the district leased, (Record, p. 35). On July 3, 1917, the cattle were sold to the Mays Cattle Company, (Record, p. 35), and thereupon McDaniels, assuming to act for himself and Kirby, made a contract with the Mays Cattle Company for the grazing of cattle on the leased premises, (Plaintiff's Exhibit No. 21, Record, p. 40). Kirby testified that he had no knowledge of the making of these contracts, and never authorized McDaniels to make any contract, except in accordance with the understanding with Cunningham, that the Taylor's Fork Company might graze on the leased premises 2500 head, which should be

removed during the summer of 1916, and, upon the removal of said cattle, might place 3000 head of other cattle thereon, (Record, p. 46). Kirby further testified that when he learned that the Taylor's Fork Company had placed on the district leased more cattle than he had agreed upon, he notified Mr. Estep, the Indian Agent of the Crow Agency, and also Mr. Wilcott, the Livestock Superintendent, that the Taylor's Fork Company had placed on the leased prsmises an excessive number of cattle, (Record, pp. 46 and 47).

A summary of the testimony with reference to the placing and grazing of the cattle of the Taylor's Fork and Mays cattle companies on the leased premises will be found in the record on pages 44 to 48, inclusive. After this summary, the following recital was made:

> "There is further testimony of the foregoing and other witnesses, but the foregoing is sufficient to disclose a conflict upon the issue in reference to the placing and grazing of the cattle of the Taylor's Fork Company and of the Mays Cattle Company on the leased premises, and relating to the defendant, Kirby, having knowledge of, consenting to, or acquiescing in, the grazing of said cattle, and relating to the payments made by said companies, or either thereof, or the said McDaniels, for grazing said cattle.
>
> "The evidence was uncontradicted that the number of cattle grazed on the leased premises by the Taylor's Fork and Mays cattle companies was largely in excess of the number mentioned in the conversation between Kirby and Cunningham, and the excess for the second year found by the court was made up in a substantial part of the said cattle so grazed on said premises by said companies in excess of the said number mentioned in said conversation, the court holding that

> the issue presented by said conflict of testimony was immaterial." (Record, pp. 48 and 49).

In the opinion of the Court, (Record, p. 56), it is said:

> "The defendants * * * labor to distinguish Kirby's cattle and those he sanctioned, from all others, a wholly useless undertaking."

The contract having limited the number of cattle which might be grazed on the leased premises, the liability for the grazing of the excess is the same as though no contract had been made. The duty to refrain from placing cattle on the district leased, in excess of the number authorized by the contract, and therefore without the consent of the Indians, was a duty imposed by law. The contractual relation between Kirby and McDaniels could not create a liability against Kirby, for a violation of law by McDaniels, in which he, Kirby, did not participate, and which he neither sanctioned nor approved.

It became the duty of the Department of the Interior to remove the excess cattle.

> Morris *vs.* Hitchcock, 194 U. S. 384.

The court, in the case just cited, quotes approvingly from the opinion of the Attorney-General of the United States:

> "Sections 2147 to 2150, inclusive, of the Revised Statutes, expressly confer the right to use the military forces of the United States in ejecting trespassers upon Indian lands, and the grant of this power carries with it the duty of its exercise....."

We submit that Kirby cannot be held liable for damages resulting from a dereliction of duty on the part of the officials of the government in charge of the reservation. He was powerless to enter on the reservation and remove the cattle of the Taylor's Fork and Mays cattle companies.

It follows that the court was in error in holding that it is immaterial whether the cattle of the Taylor's Fork and Mays cattle companies, constituting a substantial part of the excess found by the court, were placed and grazed on the leased premises without the knowledge, consent or approval of Kirby.

III

The Court erred in construing the contract to authorize the averaging of the cattle for each year separately, instead of for the two year period, the term of the lease.

The contract provided

> "that the number of cattle to be grazed on the territory described shall be limited to an average of nine thousand (9000) head."

Nothing whatever is said about the average number for each year, and the contract clearly contemplated the pasturing of the equivalent of 9000 head for two years.

During the first year the average number was 8,201.45 head, (Record, p. 27). If the court had averaged the cattle for the two year period, the number of excess found by the court would have been lessened by several hundred head.

IV

The Court erred in holding plaintiff in error, United States Fidelity and Guaranty Company, liable as surety for the payment for any excess number of cattle grazed upon the leased premises:

If the construction of the contract adopted by the court is correct, both the principals and surety in the bond or undertaking are liable for the excess. If, however, the contract limits the number of cattle, as we maintain it does, the grazing of the excess number for which a recovery was had was not authorized by the contract, constituted a trespass, the same as though no contract had been made, was without the consent of the Indians and in violation of law.

The surety did not undertake to indemnify against loss or damages resulting from a trespass or a violation of law by the principals, or either of them, but merely undertook and promised that the principals in the bond or undertaking would comply with their contract. The liability of the principals for the excess, if any, is not a contract liability; and, consequently, there can be no liability against the surety therefor.

Respectfully submitted,

M. S. Gunn,
Carl Rasch,
E. M. Hall,
O. King Grimstad, and
Rockwood Brown,

Attorneys for Plaintiffs in Error, George B Kirby and United States Fidelity and Guaranty Company.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

GEORGE B. KIRBY, CHARLES MCDANIELS, and United States Fidelity and Guaranty Company, plaintiffs in error,
v.
THE UNITED STATES OF AMERICA FOR and on behalf of the Crow Tribe of Indians.

No. 126.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case involves the construction of a clause of a "grazing lease" of certain Indian lands in Montana.

The lease (R. 6–14), with the approval of the Secretary of the Interior (R. 2), was made between the superintendent of the Crow Indian School, for and on behalf of the Crow Tribe of Indians, and the plaintiffs in error Kirby and McDaniels. To secure faithful performance of their part of the contract the lessees executed a bond in favor of the United

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States with the United States Fidelity and Guaranty Company, also plaintiff in error, as surety, in the sum of $31,950. (R. 14–16.)

The lease was for a term of two years (R. 6, 7), commencing on February 1, 1916, at an annual rental of $31,950, to be paid in equal semiannual payments in advance (R. 8), for grazing an average of 9,000 head of cattle (R. 9), and contained a provision as to payment for excess grazing. (R. 9.)

On January 12, 1920, alleging that during the term of the lease the lessees had engaged in grazing for which they had not paid the rental prescribed in the lease, the United States, on behalf of the Crow Indians, filed an amended complaint (R. 2–5) against the lessees and the surety company in the District Court of the United States for the District of Montana.

By stipulation the case was tried by the court without a jury (R. 23). The court found that during the first year of the lease there had been no grazing beyond the amount paid for by the annual rental, but that during the second year excess cattle to the extent of 6,968 head had been grazed, and accordingly entered judgment for the Government for $31,356, besides interest from February 1, 1918, and costs. (R. 24–26, 55–57. See also 51–55.)

On writ of error, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment below, except as to an item of costs which is not here material. (R. 76–81.)

The writ of error from this court was then sued out.

QUESTIONS INVOLVED.

The fundamental questions in this case are the interpretation of the provision of the lease as to excess grazing and whether, in the event of excess grazing, the lessees and their surety are liable to the lessors.

ARGUMENT.

The lessees contracted to pay $4.50 per head for the average number of cattle grazed in excess of 9,000 head.

The lease provided (R. 9):

> It is further agreed that the number of cattle to be grazed on the territory described above shall be limited to an average of nine thousand (9,000) head, the maximum number at any one time not to exceed eleven thousand five hundred (11,500) head, and that any excess over and above such maximum number shall be paid for at the rate of $4.50 per head for each and every head of such excess number, in addition to the rental herein named.

The plaintiffs in error contend that the lease does not oblige them to pay for the grazing of cattle over the average of 9,000 head but not in excess of 11,500 head.

The two lower courts, however, have decided that in so far as the average number of cattle grazed in either year taken separately exceeded 9,000, the number to which the annual rental of $31,950 applied, the lessees were bound to pay $4.50 per head per year.

It may be conceded that the clause of the lease is awkwardly worded, for it refers to two maximum

numbers, the less important of which is so called and the more important of which is not so characterized. But the two lower courts, instead of quibbling over the words, considered the intention of the parties as manifested by the clause as a whole. They decided that in the expression "any excess over and above such maximum number" the maximum referred to was the permitted maximum for the year as a whole, for which the payment of $31,950 was to be made, since that maximum was the principal thing to be considered, and not the number of 11,500, since that was simply the maximum permitted at any one time, and for such time as would serve to raise the yearly average to the 9,000 figure, the temporary maximum being merely an incidental subject for consideration.

It is submitted that such an interpretation of the clause is correct.

There is nothing in the circumstances of the case to show that the parties intended that there should be any free grazing. As they carefully provided that nearly thirty-two thousand dollars per year should be paid for the privilege of grazing up to an average of 9,000 cattle and that $4.50 per head should be paid for excess grazing, it is inconceivable that either of the parties to the lease thought at the time of its execution that all cattle between the 9,000 and 11,500 limits should be grazed free of any charge.

Moreover, the written offer which Kirby and McDaniels submitted preliminary to receiving the

lease further shows the intention of the contracting parties. They wrote (R. 28):

> Minimum amount to be paid per annum in semiannual payments in advance—$31,-950.00. The number of cattle to be grazed on this district to be 9,000 head, at the rate of $3.55 per head per annum, and that any cattle grazed in this district in excess of 9,000 head shall be paid for at the same rates per head per annum.

Such an offer certainly shows that the lessees then intended to pay for all cattle grazed beyond the 9,000 limit; and this offer should be taken into consideration in construing the terms of the contract. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 118; *Simpson* v. *United States*, 199 U. S. 397, 399; *Brawley* v. *United States*, 96 U. S. 168, 173, 174; *Maryland Dredging & Contracting Co.* v. *United States*, 241 U. S. 184, 188. See also Wigmore on Evidence, secs. 2465, 2462.

In determining the average number of cattle grazed, each year should be considered separately.

The plaintiffs in error contend that the lease contemplated the grazing of the equivalent of 9,000 head for two years; but both of the lower courts decided, we submit correctly, that the average for each year should be determined separately.

The contract was clearly divisible into two yearly periods. The rent was apportioned to each year (R. 6, 7), and was payable for each year, so that it is reasonable to conclude that the provision in regard

to extra payment for excess cattle applied to each year. As the District Court said (R. 53):

> Dealing with an annual crop, the parties dealt with each year complete and separate from the other.

This is an action to recover money at a specified rate which the lessees agreed to pay for permitted grazing in excess of a named average, and is not an action for a penalty.

The plaintiffs in error contend that if the lease is construed as they construe it, and "the rate of $4.50 was intended to apply to 'each and every head' in excess of 11,500 grazed upon the leased premises 'at any one time,'" such a rate is clearly a penalty, because it would apply to such excess even though the excess cattle were grazed upon the land for only one day and would be, therefore, entirely disproportionate to the value of the grazing privilege, as fixed by the contract; and they assert that under the law of Montana a penalty or liquidated damages could not be recovered in this case.

Assuming that the excess rate might have been applied to grazing in excess of 11,500 head "at any one time," there was no finding by the trial court of an excess of that nature. The finding related only to excess grazing by an average number of cattle (R. 55). Consequently the argument of the plaintiffs in error presents only hypothetical questions.

The contention that the price of $4.50 per head for the pasturing of cattle in excess of a given number is a provision for a penalty because the rent is dis-

proportionate to the value of the grazing privilege as fixed by the contract is without force in view of the fact that plaintiffs in error themselves made a charge of $5.25 per head to the Taylor's Fork Cattle Company for the same privilege upon the same land. (R. 32–33.)

The price of $4.50 per head for the excess of cattle pastured was neither liquidated damages nor a penalty for the breach of the contract. It was part of the substance of the agreement to pay a certain additional rental for cattle pastured in excess of a certain number. No breach of the contract was contemplated. The contract permitted the grazing of the cattle in excess of the number named. Provision is made in the lease itself for estimating the number of such excess and a price per head fixed, not as a penalty or as liquidated damages but in payment for the use of the lands for grazing of such excess. The argument based upon the assumption that this particular covenant provides for a penalty or liquidated damages for breach of the contract is built upon a fallacy, and has for its premise something which has no existence in fact.

As was pointed out by the Circuit Court of Appeals (R. 77, 78), the United States—

> does not sue for breach of a contract. There is no allegation in the complaint upon which either a penalty or liquidated damages can be predicated. There was in fact no breach of contract. The agreement left the defendants at liberty to pasture as many cattle on the

lands as they might see fit to place thereon, up to the limit of 11,500, but it provided that for cattle in excess of 9,000 and for the exercise of such privilege they should pay an increased rate of pasturage per head. The rate was increased doubtless on the theory that the presence of such excess cattle would result in some injury to the pasture, but that does not mean that the rate so fixed is compensation for damage. It was but payment for that which the plaintiff parted with and the defendants received.

The excess grazing was not unauthorized.

The plaintiffs in error contend that all excess grazing was unauthorized and therefore, under the statutes, illegal grazing, for which there can be no recovery in this action. But such a contention is not based upon a sound construction of the contract.

"Excess" grazing simply means grazing beyond the amount paid for by the fixed annual rental of $31,950. For the payment of that sum Kirby and McDaniels might pasture an average of 9,000 head, but not more than 11,500 head at any one time, and for cattle beyond those limits the charge of $4.50 per head was made. To say that such "excess" grazing, fully provided for by the contract, was unauthorized is absurd.

Where one of the joint tenants allowed grazing by third parties the other tenant is equally liable for the stipulated rent for that grazing.

Cattle belonging to third parties were put on the range, as permitted in the lease, after negotiations

with McDaniels, to whom Kirby had referred the representatives of one of the other parties (R. 44–45). They were put there under contracts signed by McDaniels in the names of Kirby and himself (R. 31–43); and a substantial part of the excess grazing for the second year was due to the presence of those cattle. (R. 49.)

There was some conflict in the evidence as to whether Kirby knew of, consented to or acquiesced in the grazing of the third parties (R. 48, 49); but the trial court held that the issue thus offered was immaterial (R. 49, 56); and this decision was properly upheld by the Circuit Court of Appeals (R. 79). Occupation by or under one of the two joint tenants under the lease renders both tenants liable for the rent. *Kendall* v. *Carland*, 5 Cush. 74, 80; *Goshorn* v. *Steward*, 15 W. Va. 657, 664; *Glenn* v. *Dungey*, 4 Exch. 61, 64.

The surety is liable to the extent of the bond.

As is frankly admitted in the brief for Kirby and the surety,

> If the construction of the contract adopted by the court is correct, both the principals and surety in the bond or undertaking are liable for the excess.

JAMES M. BECK,
Solicitor General.
ROBERT P. REEDER,
Special Assistant to the Attorney General.
NOVEMBER, 1922.

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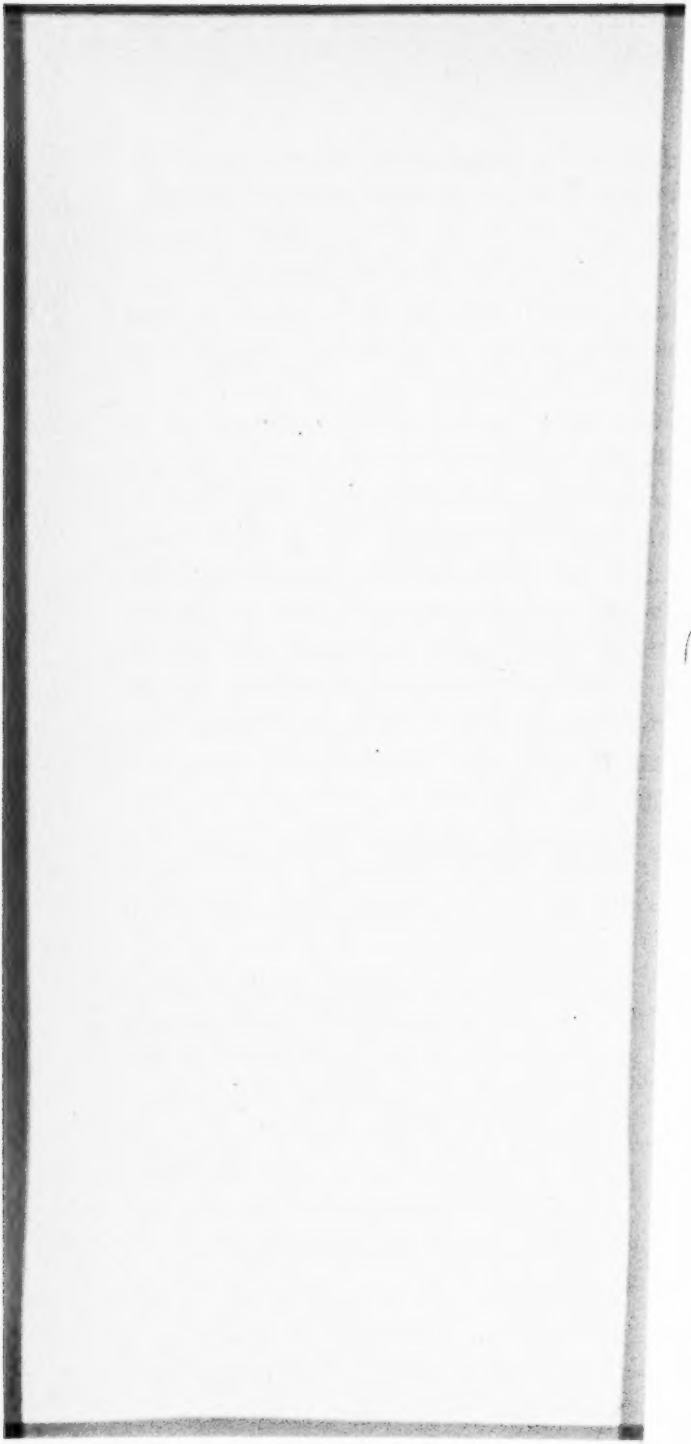

KIRBY ET AL. v. UNITED STATES, FOR AND ON BEHALF OF THE CROW TRIBE OF INDIANS.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 126. Argued November 27, 1922.—Decided December 11, 1922.

A lease of Indian land for cattle grazing, for two years, at a minimum rental of $31,950 per year, provided that the number of cattle to be grazed should "be limited to an average of 9,000 head, the maximum number at any one time not to exceed 11,500 head," and that "any excess over and above such maximum number shall be paid for at the rate of $4.50 per head for each and every head of such excess number," in addition to the rental named. *Held*, reading these with other provisions of the lease and with the written proposal therefor, and considering the subject-matter—

(1) That the average of 9,000 head was for each year separately, to be paid for by the minimum rental, and that the additional charge of $4.50 per head applied to all in excess of that average, and not merely to any excess over 11,500 head grazed at any one time. P. 425.

(2) The $4.50 charge was neither a penalty nor liquidated damages. P. 427.

(3) The act of one of the two lessees, who was in charge of the leased area, in admitting additional cattle to graze, was the act of both. P. 427.

273 Fed. 391, affirmed.

ERROR to a judgment of the Circuit Court of Appeals affirming a judgment recovered by the United States in the District Court in an action for rent against two lessees and their surety.

Mr. M. S. Gunn and *Mr. Edgar Allen Poe*, with whom *Mr. Carl Rasch*, *Mr. E. M. Hall*, *Mr. O. King Grimstad* and *Mr. Rockwood Brown* were on the brief, for plaintiffs in error.

Mr. Assistant Attorney General Seymour, with whom *Mr. Solicitor General Beck* and *Mr. Robert P. Reeder*,

Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

With the approval of the Secretary of the Interior certain lands of the Crow Tribe of Indians in Montana were leased to George B. Kirby and Charles McDaniels for the grazing of cattle for two years beginning February 1, 1916. A bond, in which the United States Fidelity and Guaranty Company joined as surety, was given by the lessees for the faithful performance of their obligations. The lease required them to pay a minimum rental of $31,950 per year and to abide by the following provision:

"And it is further agreed that the number of cattle to be grazed on the territory described above shall be limited to an average of 9,000 head, the maximum number at any one time not to exceed 11,500 head, and that any excess over and above such maximum number shall be paid for at the rate of $4.50 per head for each and every head of such excess number, in addition to the rental herein named."

The lessees paid the rental of $31,950 for each of the two years, but failed to pay an additional sum claimed under that provision for cattle grazed in excess of the prescribed average.

On behalf of the tribe the United States sued the lessees and the surety company to recover the additional sum so claimed; and the defendants answered denying that there had been any excess grazing. The issues were tried to the court, a jury being waived by written stipulation. The court found that there was no excess grazing during the first year, but that the cattle grazed during the second year exceeded "the contract maximum average of 9,000 head for the year" by what was "equivalent to 6,968 head for one year." For this excess a recovery was allowed at

the rate of $4.50 per head, which was affirmed by the Circuit Court of Appeals. 273 Fed. 391. The defendants prosecute the present writ of error.

The chief controversy is over the meaning and effect of the provision we have quoted from the lease. Pointing to it, the defendants contend (a) that any grazing in excess of an average of 9,000 head was prohibited, and therefore was a trespass for which no recovery could be had in a suit on either the lease or the bond; (b) that the additional payment at the rate of $4.50 per head was to be made only for any excess over 11,500 head grazed at any one time; and (c) that the intended average of 9,000 head was for the full two-year period and not for either year taken separately. Both courts below rejected these contentions.

The provision relied on was loosely framed and, if read alone, might well be regarded as of uncertain meaning. But it is to be read with other provisions of the lease, with the written proposal of the lessees whereby the lease was obtained, and in the light of the conditions which naturally prompted some provision on the subject. When it is examined in this way, the explanation for it and its meaning are shown to be as follows: The parties recognized that pasturage, being an annual crop, is lost if not utilized before the next growing season, and they evidently intended to deal with each year as a distinct period. A minimum rental of $31,950 was to be paid to the lessors for each year. Payment of that sum was to give the lessees the right to graze 9,000 cattle on the leased area for the particular year. But it was not practicable to have a definite number grazing throughout the year, for marketing some and bringing in others would cause the number to vary materially. So, an average of 9,000 head was agreed on. This would permit a shortage in one part of the year to be made up by a corresponding increase in another part. But to prevent this privilege from being carried to extreme lengths, the provision for an average

was qualified by saying "the maximum number at any one time not to exceed 11,500 head." The purpose of that provision, as thus qualified, was to define the grazing which might be done for the minimum rental of $31,950;—in other words, to show that the grazing which might be done without further payment was limited to an average of 9,000 cattle. But the parties recognized the propriety of making some provision respecting the possible grazing of a larger number and the charge to be paid for it. Accordingly, they said in a succeeding clause that "any excess over and above such maximum number shall be paid for at the rate of $4.50 per head." The maximum number there intended was evidently the number which might be grazed for the minimum rental,—that is to say, an average of 9,000 head; for of course the point to which that rental extended must have been the one at which the charge for additional grazing was to begin. It was not intended that any grazing should be free, but, on the contrary, that all that was not covered by the minimum rental should be paid for at the rate of $4.50 per head. The District Court aptly said:

"The language of the lease, that this $4.50 per head is payable for 'any excess over and above such maximum number,' does not necessarily import only cattle over and above 11,500 head, the last antecedent and maximum *eo nomine*, but consistent with the writing and construction can be and is taken to import cattle over and above 9,000 head, the first antecedent and also a maximum, although not in terms so characterized. Nine thousand head are the maximum for the year as a whole, the principal thing, and the 11,500 are the maximum at any time (and for such time as will serve to accomplish the 9,000 maximum), an incidental thing. . . Defendants' argument that by the terms of the lease they are to pay only for excess over 11,500 head, and that for all between 9,000 head and 11,500 head they would be amenable only to the

relevant criminal law applicable to trespassers, is untenable."

The Circuit Court of Appeals construed the lease in the same way, and we think that construction is the correct one. As the three contentions before stated all depend on a contrary construction they must fail.

The $4.50 rate is assailed as being a penalty or liquidated damages, and therefore condemned by a statute of the State. We think it is neither a penalty nor liquidated damages. It was not to be paid for any breach of contract, but as compensation for particular grazing contemplated in the lease and not covered by the rental otherwise fixed. Whether the state statute could affect a contract made by the United States on behalf of Indian wards need not be considered.

At the trial it appeared that the additional cattle were admitted to and grazed on the leased area by one of the lessees, who had special charge of the operations under the lease; and there was a conflict in the evidence as to whether the other lessee consented to or acquiesced in those acts. The District Court ruled that the conflict was immaterial and that the acts of the lessee in charge were the acts of both. Complaint is made of this, but it obviously was right. *Kendall* v. *Carland*, 5 Cush. 74; *Goshorn* v. *Steward*, 15 W. Va. 657, 664.

Judgment affirmed.